Supreme Court, U.S.
FILED
00 832 NOV 22 2000
OFFICE OF THE CLERK

No. 00-

IN THE

Supreme Court of the United States

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Petitioner,

v.

GULF POWER COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

DANIEL L. BRENNER
NEAL M. GOLDBERG
NATIONAL CABLE TELEVISION ASSOCIATION, INC.
1724 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 775-3550

PETER D. KEISLER *
PAUL J. ZIDLICKY
SIDLEY & AUSTIN
1722 Eye St., N.W.
Washington, D.C. 20006
(202) 736-8000

PAUL GLIST
JOHN D. SEIVER
GEOFFREY C. COOK
COLE, RAYWID & BRAVERMAN, L.L.P.
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 659-9750

Counsel for Petitioner

November 22, 2000

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the provision of Internet service by a cable television system divests the Federal Communications Commission of regulatory authority it would otherwise have under 47 U.S.C. § 224 to ensure that the "rates, terms, and conditions" for "any attachment by a cable television system . . . to a pole . . . owned or controlled by a utility" are "just and reasonable."

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings in the Eleventh Circuit are listed in Appendix A, Pet. App. 1a-4a, and Appendix G, Pet. App. 104a.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states that it has no parent corporations and it has issued no publicly held stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES AND AFFILIATES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
A. The Cable Television Industry	4
B. Statutory And Regulatory Background	6
C. The Commission's Report And Order	10
D. The Court Of Appeals' Decisions	11
REASONS FOR GRANTING THE PETITION	15
THE COURT OF APPEALS DECISION REJECTING THE FCC'S AUTHORITY OVER ACCESS BY CABLE TELEVISION SYSTEMS TO BOTTLE-NECK FACILITIES NECESSARY TO PROVIDE INTERNET SERVICE IS CONTRARY TO 47 U.S.C. § 224, CONFLICTS WITH A DECISION OF THE D.C. CIRCUIT AND UNDERMINES THE PUR-POSES OF THE 1996 ACT ON AN ISSUE OF NATIONAL IMPORTANCE	16
CONCLUSION	26

TABLE OF AUTHORITIES

Page

CASES

AT&T Corp. v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999) 8, 22, 23, 25
Allen v. *Grand Cent. Aircraft Co.*, 347 U.S. 535 (1954) 18
Dole v. *United Steelworkers of Am.*, 494 U.S. 26 (1990) 22
FCC v. *Florida Power Corp.*, 480 U.S. 245 (1987) 6, 7
Landreth Timber Co. v. *Landreth*, 471 U.S. 681 (1985) 17
Monongahela Power Co. v. *FCC*, 655 F.2d 1254 (D.C. Cir. 1981) 7
Texas Utils. Elec. Co. v. *FCC*, 997 F.2d 925 (D.C. Cir. 1993) ..... *passim*
United Sav. Ass'n v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365 (1988) 22

STATUTES

Communications Act Amendments of 1978, Pub. L. No. 95-234, 92 Stat. 33 7
Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 6
15 U.S.C. § 79z-5c 8, 22, 25
28 U.S.C. § 2112 11
§ 2342 24
47 U.S.C. § 157, statutory note 3, 9, 22, 25
§ 224 ..... *passim*
§ 230 ..... 9, 22, 25
§ 251(c)(3) 9, 22
§ 253 ..... 8, 22
§ 541(b)(3)(B) 8, 22

TABLE OF AUTHORITIES – continued

Page

ADMINISTRATIVE DECISIONS

Report, *Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecomms. Act of 1996*, 14 FCC Rcd 2398 (1999) 4, 5, 6, 24, 25
Report and Order, *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 (1998), *aff'd in part, rev'd in part*, 208 F.3d 1263 (11th Cir. 2000) 10
Second Report, *Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecomms. Act of 1996*, CC Docket No. 98-146 (FCC Aug. 21, 2000) 5

OTHER AUTHORITIES

2B N. Singer, *Sutherland Statutory Construction* (6th Ed. 2000) 18
FCC, *Federal Communications Commission Releases Data on High-Speed Services for Internet Access* (Oct. 31, 2000) 5, 9
J. Goodale, *All About Cable* (2000) 4, 6

IN THE

Supreme Court of the United States

No. 00-

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Petitioner,

v.

GULF POWER COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner National Cable Television Association, Inc. ("NCTA") respectfully requests that this Court grant its petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is published at 208 F.3d 1263 (11th Cir. 2000) and is reproduced in the Appendix to this Petition ("Pet. App.") at 1a-37a. The *Report and Order* of the Federal Communications Commission ("FCC" or "Commission") is

---

[1] NCTA is the principal trade association of the cable television industry in the United States. Its members include owners and operators of cable television systems serving over 90 percent of the nation's cable television households, as well as cable television program networks, cable equipment suppliers, and others interested in or affiliated with the cable television industry.

published at *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 (1998). Relevant portions of the *Report and Order* are reproduced at Pet. App. 38a-68a. The court of appeals' orders denying the petitions for rehearing are unpublished, and its order denying the petitions for rehearing *en banc* is published at 226 F.3d 1220 (11th Cir. 2000) (per curiam). Those orders are reproduced at Pet. App. 77a-96a. The court of appeals' order staying the mandate pending the filing of a petition for certiorari is unpublished and is reproduced at Pet. App. 69a-76a.

JURISDICTION

The court of appeals entered judgment on April 11, 2000, and denied timely petitions for rehearing and petitions for rehearing en banc on September 12, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 703 of the Telecommunications Act of 1996 ("1996 Act") is codified at 47 U.S.C. § 224 ("Section 224"). Section 224 provides, in pertinent part, that (1) a "pole attachment" is "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility," *id.* § 224(a)(4); (2) a "utility" is "any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications," *id.* § 224(a)(1); and (3) the FCC "shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable," *id.* § 224(b)(1). The complete text of Section 224 is reproduced at Pet. App. 97a-102a.

Section 706 of the 1996 Act provides that "[t]he Commission . . . shall encourage the deployment on a reasonable

and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . methods that remove barriers to infrastructure investment." 47 U.S.C. § 157, statutory note. The complete text of Section 706 is reproduced at Pet. App. 102a-103a. Section 509 of the 1996 Act provides: "It is the policy of the United States—(1) to promote the continued development of the Internet and other interactive computer services." 47 U.S.C. § 230(b).

STATEMENT OF THE CASE

This case presents the issue whether cable systems that choose to provide Internet services, using the same lines that they use to provide video programming services, thereby forfeit regulatory oversight designed to ensure "just and reasonable" "rates, terms, and conditions" for their access to essential bottleneck facilities owned or controlled by utilities. This issue, which has arisen in a consolidated, nationwide appeal of the FCC's implementation of Section 224, is critical to the development and availability of high-speed Internet services that Congress and the FCC have indicated are vital to the national economy. As Judge Carnes explained, the issue presented here "may affect every person who uses . . . Internet service in this country." Pet. App. 96a.

The decision below warrants review because the court of appeals improperly rejected the FCC's conclusion that a cable operator does not forfeit the protections provided by Section 224 when it provides Internet service to its subscribers in addition to its traditional video programming services. That decision is contrary to the language of Section 224 and conflicts with a prior decision of the D.C. Circuit which deferred to the Commission's reasonable interpretation of Section 224. Moreover, the decision below frustrates the central purposes of the 1996 Act of encouraging competition for communications services by eliminating barriers to market entry and of encouraging the development and availability of Internet and other advanced services.

A. The Cable Television Industry.

Cable television began more than 50 years ago as a means to provide antenna service to households in mountainous or geographically remote areas where reception of over-the-air television signals was poor. J. Goodale, *All About Cable* § 1.02, at 1-6 (2000) ("Goodale, *Cable*"). Since its inception, the cable industry has grown dramatically in its importance to the national economy. In 1950, a total of 70 cable systems transmitted local broadcast signals to just 14,000 subscribers nationwide. By the mid 1980s, nearly 53 million households subscribed to cable services, and today about 7 of 10 television households (more than 65 million) subscribe to a cable television service.

Just as the size of the cable industry has grown, so too has the scope of the services that cable operators provide to their subscribers. In addition to serving as a community "antenna" in areas where reception is otherwise poor, cable operators have expanded their services to include cable programming networks that provide video entertainment and information to the industry's subscribers. Similarly, by the late 1980s, the cable industry began providing its subscribers "nonvideo communications services, such as data transmission." *Texas Utils. Elec. Co.* v. *FCC*, 997 F.2d 925, 927 (D.C. Cir. 1993). Recent technological advances have allowed cable operators, who have invested billions of dollars in the effort, to upgrade further their existing coaxial cables and other equipment so that they can simultaneously carry both traditional video programming services and high-speed or "broadband" Internet access at data transmission speeds hundreds of times faster than the "narrowband" services available through traditional telephone lines. The cable industry thus actively competes against numerous segments of the communications industry to provide high-speed Internet services to consumers nationwide. See Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to*

Accelerate Such Deployment Pursuant to Section 706 of the Telecomms. Act of 1996, 14 FCC Rcd 2398, 2404 (¶ 12) (1999) ("*Section 706 Report*").

As the FCC has noted, "[w]idespread access" to high-speed or broadband Internet services "can increase our nation's productivity and create jobs" as well as "meaningfully improve our educational, social, and health care services." *Section 706 Report*, 14 FCC Rcd at 2400 (¶ 2). Indeed, the FCC has concluded that development of such services is important because it will provide consumers with "the ability to download feature-length movies in a matter of minutes," "change web pages as fast as changing the channel on a television" and create "new possibilities . . . for electronic commerce." *Id.* at 2401 (¶ 3).

As to this important developing high-speed service, the cable industry has been instrumental. See *id.* at 2415-16 (¶ 37) (describing multi-billion dollar investments by cable operators to develop this service). For example, in August 2000, the Commission reported that 1.4 million of the 1.8 million high-speed lines to residential homes and small businesses were provided by cable technology. Second Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, at 33 (¶ 71 & Fig. 5) (FCC Aug. 21, 2000) ("*Second Section 706 Report*"). More recently, the Commission reported that there were 4.3 million broadband lines connecting homes and small businesses to the Internet and that the cable industry provided about 2.2 million such lines. FCC, *Federal Communications Commission Releases Data on High-Speed Services for Internet Access*, at 1 (Oct. 31, 2000) ("FCC, *Data on High-Speed Services for Internet Access*"). The development of these services by the cable industry is likewise spurring development and deployment of competing high-speed

services (known as "DSL") by telephone companies. See *Section 706 Report*, 14 FCC Rcd at 2419 (¶ 42).

Although the cable industry has undergone a remarkable transformation over the past 50 years, it remains equally true today that "to deliver television signals to their subscribers," cable operators "must have a physical carrier for the cable." *FCC* v. *Florida Power Corp.*, 480 U.S. 245, 247 (1987). As this Court has explained, "virtually the only practical physical medium for installation of television cables" has been poles, ducts, and rights-of-way owned or controlled by local utilities. *Id.* Accordingly, a cable system's "right to secure the use of those facilities on reasonable terms may be crucial to its very existence." Goodale, *Cable* § 6.01, at 6-3. Because high-speed Internet services offered by cable operators are "commingled" with traditional cable services "on one transmission facility," Pet. App. 63a (¶ 30), cable operators that provide high-speed Internet services and traditional cable services must rely on utilities for reasonable and affordable access to "poles, ducts, conduits, or rights-of-way" that are necessary to deliver these commingled services to their subscribers. Moreover, the incentive that these utilities have to deny such access on just and reasonable terms has increased because the 1996 Act lifts restrictions that previously prohibited them from diversifying into telecommunications and other services where they can compete against cable entities and others. See Pub. L. No. 104-104, 110 Stat. 56, 81-86, § 103 (1996) (codified at 15 U.S.C. § 79z-5c).

This case presents the issue whether cable operators forfeit regulatory protections that ensure that they will have access to these bottleneck facilities on just and reasonable terms if they choose to provide Internet services as well as their traditional video programming.

B. Statutory And Regulatory Background.

A review of the development of the statutory and regulatory structure governing access by cable operators to bottleneck

facilities is necessary to put the issue presented in this case into proper context.

In 1978, in response to complaints that utility companies were exploiting their monopoly power over bottleneck facilities needed by cable television systems to deliver their services to consumers, Congress enacted the Pole Attachment Act ("1978 Act"). See *Florida Power Corp.*, 480 U.S. at 247. The 1978 Act provided that the FCC "shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." Pub. L. No. 95-234, sec. 6, § 224(b)(1), 92 Stat. 33, 35 (1978).[2] The 1978 Act defined the term "pole attachment" as "*any attachment* by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility." *Id.* (emphasis added). The Commission's rules implementing the 1978 Act and, in particular, its "procedure for determining whether rates" for attachments by cable television systems "are just and reasonable," were affirmed by the D.C. Circuit. *Monongahela Power Co.* v. *FCC*, 655 F.2d 1254, 1256 (D.C. Cir. 1981) (per curiam). The *Monongahela* Court explained that "[t]he statute itself is all-encompassing in its wording: the FCC is to 'regulate the rates, terms, and conditions for pole attachments to provide that [they] are just and reasonable.'" *Id.*

A decade later, the scope of the FCC's authority to regulate "rates, terms, and conditions" again became an issue when the cable industry sought "to enter the growing market for nonvideo communications services, such as data transmission." *Texas Utils.*, 997 F.2d at 927. In that case, a utility

---

[2] Further, the 1978 Act provided that a "rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space . . . which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility to the entire pole . . . ." Pub. L. No. 95-234, sec. 6, § 224(d)(1), 92 Stat. 33, 36 (1978)

that provided a cable operator with access to poles necessary to deliver cable services imposed, in addition to the annual rate of $5 per pole, "a surcharge of between $50 and $100 per pole where the cable, at least in part, transmit[ed] nonvideo communications." *Id.* at 927. The FCC rejected claims that its "statutory authority over pole attachment rates was limited to those attachments distributing video programming." *Id.* Rather, the FCC concluded that "'Section 224 is most reasonably read to provide that a cable operator may seek Commission-regulated rates for all pole attachments within its system, *regardless of the type of service provided over the equipment attached to the poles*.'" *Id.* (emphasis added). The D.C. Circuit affirmed, holding that the FCC "arrived at a permissible construction, rational and consistent with the congressional purpose in enacting the [1978 Act]." *Id.*

Against this backdrop, Congress enacted the 1996 Telecommunications Act ("1996 Act"). As this Court has explained, the 1996 Act "fundamentally restructures" the markets for communications services throughout the country and "profoundly affects a crucial segment of the economy worth tens of billions of dollars." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371, 397 (1999). Despite its unquestioned importance, the 1996 Act has been subject to criticism because "in many important respects" it is "a model of ambiguity." *Id.* at 397. There are, however, several components of the 1996 Act that are clear.

First, the 1996 Act clearly was designed to foster increased competition in the markets for the provision of communications services. By its terms, the 1996 Act accomplishes this goal, at least in part, by doing away with barriers put in place by government-granted incumbent monopolies, see, *e.g.*, 47 U.S.C. § 253, by allowing *all* competitors to compete in *all* markets, see, *e.g.*, 15 U.S.C. § 79z-5c; 47 U.S.C. § 541(b)(3)(B), and by requiring firms that control bottleneck facilities to share those facilities on regulated terms with firms that would use them to offer services to the

public, see, *e.g.*, *id.* § 251(c)(3). Further, the 1996 Act directs the FCC to encourage the development and deployment of high-speed Internet services. Specifically, Section 706 of the 1996 Act directs the Commission to "encourage the deployment . . . of advanced telecommunications capability to all Americans . . . by . . . regulating methods that remove barriers to infrastructure investment." 47 U.S.C. § 157, statutory note. In turn, "advanced telecommunications capability" is defined as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications." *Id.* In addressing this directive, the FCC has focused on the development and availability of high-speed Internet service. See, *e.g.*, FCC, *Data on High-Speed Services for Internet Access*, at 1. Indeed, in the 1996 Act, Congress announced that "[i]t is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media." 47 U.S.C. § 230(b).

Consistent with the overarching purposes of this statutory regime, the 1996 Act amended Section 224 to further these pro-competitive goals. The protections provided by Section 224 were expanded to provide a right of "non-discriminatory access" that requires that a utility "shall provide . . . non-discriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." *Id.* § 224(f)(1). Further, while the protections of Section 224 previously applied only to cable operators, the 1996 Act modified Section 224 to extend its protections against the abuse of bottleneck facilities by utilities to "provider[s] of telecommunications service." *Id.* § 224(a)(4). Correspondingly, the structure of the Commission's rate regulations was modified in two ways. First, the preexisting rate structure that applied to attachments by cable operators was expressly "grandfathered" "for any pole attachment used . . . solely to provide cable service." *Id.* § 224(d)(3). A separate rate structure, however, was added

"to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services." *Id.* § 224(e)(1).

Other significant aspects of Section 224 remained unchanged. Specifically, the 1996 amendments imposed no limitation on the Commission's general authority to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." *Id.* § 224(b)(1). Similarly, "pole attachment" continues to be defined as "*any* attachment . . . to a pole, duct, conduit, or right-of-way owned or controlled by a utility." *Id.* § 224(a)(4) (emphasis added).

C. The Commission's Report And Order.

Pursuant to its statutory obligation to implement the amendments to Section 224, the Commission sought and received scores of comments from a wide variety of parties from across the country. *Report and Order*, 13 FCC Rcd 6777, 6857-59 (1998) (Appendix B). As relevant here, the Commission considered whether the 1996 Act restricted the services that cable operators could provide over pole attachments while still being covered by Section 224. In doing so, the Commission explained that prior to the 1996 Act, Section 224 applied to "the provision by a cable operator of both traditional cable services and nontraditional services on a commingled basis over a single network" and "that a cable system providing both video and nonvideo broadband services is not excluded from the benefits of Section 224." Pet. App. 60a-61a & n.111 (¶ 27) (citing *Texas Utils.*, 997 F.2d at 936).

After considering comments by interested parties, the Commission concluded that its prior analysis regarding the regulatory scope of Section 224 had not been "'overruled' by the passage of the 1996 Act insofar as it held that a cable system is entitled to a Commission-regulated rate for pole attachments that the cable system uses to provide commingled

data and video." Pet. App. 62a-63a (¶ 30). The Commission reasoned that under Section 224, as amended, the "definition of 'pole attachment' does not turn on what type of service the attachment is used to provide" but instead "include[s] any attachment by a 'cable television system.'" *Id.* at 63a (¶ 30). Thus, the Commission explained that "the rates, terms and conditions for all pole attachments by a cable television system are subject to the Pole Attachment Act." *Id.* And, applying Section 224(b)(1), the Commission ruled that it "had a duty to ensure that such rates, terms, and conditions are just and reasonable." *Id.*

The Commission explained that it saw "nothing on the face of Section 224 to support the contention that pole owners may charge any fee they wish for Internet and traditional cable services commingled on one transmission facility." Pet. App. 63a (¶ 30). Specifically, the Commission highlighted that the "purpose of the amendments to Section 224 made by the 1996 Act," was "to remedy the inequitable position between pole owners and those seeking pole attachments," *id.* (¶ 31), and that the nature of that relationship "is not altered when the cable operator seeks to provide additional service," *id.* The Commission reasoned that if it were to interpret Section 224 to exclude cable operators that also provide Internet services, then Section 224 "would penalize cable entities that choose to expand their services in a way that will contribute 'to promot[ing] competition in every sector of the communications industry,' as Congress intended in the 1996 Act." *Id.* at 63a-64a (¶ 31) (alteration in original).

D. The Court Of Appeals' Decisions.

Appeals from the *Report and Order* were filed in the Third, Fourth, Sixth, Seventh, Eighth, Eleventh, and D.C. Circuits. Pet. App. 14a-15a. Pursuant to 28 U.S.C. § 2112, these appeals were consolidated, and through a random lottery, were transferred to the Eleventh Circuit. A divided panel rejected the FCC's interpretation of Section 224.

The panel largely ignored the Commission's statutory analysis of Section 224. Instead, the panel ruled that because subsections (d) and (e) of Section 224 provided specific rules governing the rate mechanism for "'solely cable services'" and "telecommunications service," the Commission could only regulate the "'rates, terms, and conditions'" of pole attachments for those specific purposes. Pet. App. 25a, 26a. That is, the panel majority believed that "[f]or the FCC to be able to regulate the rent for an attachment that provides Internet service then, Internet service must qualify as either a cable service or a telecommunications service." *Id.* at 26a. Applying that framework, the panel decided that Internet service was not a "cable service," *id.* at 26a-29a,[3] and that "there is no statutory basis for the FCC to regulate the Internet as a telecommunications service," *id.* at 29a. As a result, the panel majority held that "the 1996 Act does not authorize the FCC to regulate pole attachments for Internet service." *Id.*

In reaching that conclusion, the majority expressly "decline[d]" "to adopt the D.C. Circuit's reasoning in *Texas Utilities*" to "determin[e] whether pole attachments used by a cable television company to provide Internet service are entitled to a regulated rent." Pet. App. 27a-28a n.32. The majority acknowledged that the D.C. Circuit had "deferred to the FCC's interpretation that co-mingled services were covered by section 224," but stated that it felt "no need to follow the reasoning of *Texas Utilities*" because the D.C. Circuit decision was issued "before the 1996 amendments [to Section 224] were enacted." *Id.* at 28a n.32. According to the panel, the 1996 amendments to Section 224 "eliminate[d] the ambiguity" regarding the Commission's authority con-

[3] The panel erroneously suggested that the "FCC argue[d] that Internet service provided by a cable television system is . . . 'solely cable services.'" Pet. App. 25a. In fact, in its *Report and Order*, the Commission stated that it "need not decide at this time . . . the precise category into which Internet services fit." *Id.* at 66a (¶ 34).

fronted by the D.C. Circuit in *Texas Utilities*. *Id.* Therefore, the panel below stated that it was presented "with an entirely different situation from that faced by the D.C. Circuit in *Texas Utilities*." *Id.*

Judge Carnes dissented. He explained that the "plain language" of Section 224 refuted the panel's conclusion regarding the Commission's authority to regulate attachments by cable operators that provide Internet service. Pet. App. 33a. Judge Carnes noted that "Section 224(b)(1) provides that the FCC 'shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable.'" *Id.* at 34a. Further, he explained that "[t]he term 'pole attachment' is defined . . . as '*any* attachment by a cable television system,'" *id.*, and that the word "'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind,'" *id.* (quoting *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997)). Judge Carnes employed that commonsense statutory analysis to conclude that "the FCC has the authority to regulate "*all* attachments, i.e., attachments 'of whatever kind.'" *Id.*

On September 12, 2000, the panel denied petitions by the Commission and NCTA for rehearing and for rehearing en banc. Pet. App. 83a, 87a. Judge Carnes dissented from the denial of rehearing en banc. *Id.* at 88a-96a. In his dissent, Judge Carnes noted that the "order denying rehearing en banc in this case indicates" that "five of the twelve judges in active service on [the Eleventh Circuit] are disqualified from participating in this important case." *Id.* at 89a. Judge Carnes explained that because the Eleventh Circuit's rules require a majority of "all active circuit judges . . . including those judges who are disqualified from participating," the only way that rehearing en banc could be ordered in this case would be if "the judge who authored the majority opinion for the panel want[ed] to have it reviewed by the court sitting en banc." *Id.* at 88a, 90a. Given that this possibility is "rare," Judge Carnes lamented that, in this case, "the law of this circuit is decided

. . . by the vote of a senior judge from another circuit who was on the panel and broke the tie created by the conflicting votes of the two judges of this court in active service who were on the panel." *Id.* at 90a.

That result, Judge Carnes explained, was "particularly unfortunate" "because this is an important case that may affect every person who uses . . . Internet service in this country." Pet. App. 96a. Specifically, Judge Carnes highlighted that this case came to the Eleventh Circuit "on consolidated petitions for review," that it "involve[d] the competing interests of [power] companies, telephone companies, cable television companies, wireless communication companies, Internet service providers, and of course, consumers," *id.*, and that "because this case arose on Hobbs Act review of FCC rules, it may be the last opportunity for *any* court to address the core, industry-shaping issues presented," *id.* (internal quotation marks omitted; emphasis in original). According to Judge Carnes, "[a] more national case could hardly be imagined." *Id.*

NCTA and the FCC filed motions to stay the court of appeals' mandate pending the filing of a petition for a writ of certiorari in this Court. In its motion, NCTA explained that the panel's ruling could "forever alte[r]" the "competitive race" among "cable, utilities, and telephone" for the provision of Internet service and "depriv[e] the American public of the competitive provision of communications service." NCTA's Motion for Stay of Mandate at 10, *Gulf Power Co.* v. *FCC*, No. 98-6222 (11th Cir. 2000). Indeed, after the court of appeals issued its decision, some utilities immediately informed cable operators that they would raise the rates they charged for pole attachments by 500 percent and have argued that the Commission would no longer have jurisdiction over such rates where Internet services are commingled with other communications services. *Id.* at 11-12.

On October 12, 2000, the court of appeals granted the motions to stay the mandate pending the filing of a petition for certiorari. Pet. App. 73a-76a.

REASONS FOR GRANTING THE PETITION

The petition for certiorari should be granted because the court of appeals' decision incorrectly resolved an issue of critical importance to the development of an important component of the Nation's economy and to Congress' goal of ensuring the timely and full deployment of high-speed Internet services to all Americans.

The panel majority erroneously concluded that in the 1996 Act Congress sought to penalize cable television systems by stripping them of the regulatory protections of Section 224 if they choose to provide Internet services that travel along the same lines as their traditional cable television services. That conclusion is wrong. Section 224, by its terms, mandates that the Commission must ensure "just and reasonable" "rates, terms, and conditions" for "pole attachments," which are defined as "any attachment by a cable television system . . . to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4), (b)(1).

Moreover, the decision below conflicts with the D.C. Circuit's conclusion that cable operators do not forfeit the protections of Section 224 when they commingle video and nonvideo data transmissions on the same cable lines. The Eleventh Circuit's effort to distinguish the D.C. Circuit's prior ruling merely highlights that the panel's interpretation of the 1996 amendments to Section 224 cannot be reconciled with the central goals of the 1996 Act. Specifically, the court of appeals concluded that the 1996 Act overruled the decision in *Texas Utilities* insofar as that holding applied to video programming commingled with Internet services. That cannot be the case. To the contrary, the 1996 Act left unchanged the FCC's responsibility to regulate rates for "any" pole

attachment. Moreover, stripping cable operators of essential regulatory protections if they offer Internet services would directly undermine the 1996 Act's goals of fostering competition for the provision of communications services and promoting the continued development and deployment of Internet service. Indeed, the decision below provides no persuasive reason to support its conclusion that Congress intended that cable operators would lose their rights under Section 224 if they further these congressional goals by providing Internet service to their subscribers.

Finally, proper resolution of this issue is of critical importance to a fast-developing component of the communications industry and could have a profound effect on multi-billion dollar investments and the potential for further investment in the competition to provide the high-speed Internet services that Congress sought to promote. Because this case is a consolidation of numerous Hobbs Act appeals filed across the country, the issue decided by the majority cannot be litigated in any other courts of appeals. That fact is especially important because the divided panel's ruling was effectively insulated from en banc review. As explained by Judge Carnes, unless certiorari is granted, the national law on these "industry-shaping issues of exceptional importance" will have been set by "one active judge of [the Eleventh Circuit] joined by a senior judge from another court." Pet. App. 96a.

THE COURT OF APPEALS DECISION REJECTING THE FCC'S AUTHORITY OVER ACCESS BY CABLE TELEVISION SYSTEMS TO BOTTLENECK FACILITIES NECESSARY TO PROVIDE INTERNET SERVICE IS CONTRARY TO 47 U.S.C. § 224, CONFLICTS WITH A DECISION OF THE D.C. CIRCUIT AND UNDERMINES THE PURPOSES OF THE 1996 ACT ON AN ISSUE OF NATIONAL IMPORTANCE.

1. The panel majority's decision holding that cable operators forfeit the protections of Section 224 if they choose to provide Internet service along the same cable lines that

they use to provide traditional cable television services is contrary to the language of Section 224. As this Court repeatedly has explained, "'[t]he starting point in every case involving construction of a statute is the language itself.'" *Landreth Timber Co.* v. *Landreth*, 471 U.S. 681, 685 (1985) (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)).

The language of Section 224 is clear. It provides that "the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. § 224(b)(1). Subsection (a)(4) defines "pole attachment," as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." *Id.* § 224(a)(4). Based on this language, the Commission properly concluded that the "the definition of 'pole attachment' does not turn on what type of service the attachment is used to provide," and therefore "the rates, terms, and conditions for *all* pole attachments by a cable television system are subject to [Section 224]." Pet. App. 63a (¶ 30) (emphasis added).

In its decision, the panel majority ignored this controlling statutory language. Instead, it focused on subsections (d) and (e) of Section 224 and held that these subsections unambiguously *divested* the Commission of authority to regulate pole attachments when a cable operator chooses to provide Internet services as well as traditional cable television programming over the same facilities. Pet. App. 25a & n.29. According to the panel, because Congress dictated the rate mechanism that the Commission should apply for a "cable television system solely to provide cable service," 47 U.S.C. § 224(d)(3), and "telecommunications carriers to provide telecommunications services," *id.* § 224(e)(1), Congress thereby stripped the Commission of all authority to regulate the "rates, terms, and conditions" for pole attachments under any other circumstances. Pet. App. 26a, 29a.

But that conclusion is clearly wrong. When Congress amended Section 224 in 1996, the law was settled that Section 224 already authorized the Commission to regulate pole attachments by a cable operator "regardless of the type of service provided over the equipment attached to the poles." *Texas Utils. Elec. Co.* v. *FCC*, 997 F.2d 925, 927 (D.C. Cir. 1993) (internal quotes omitted).[4] In the 1996 Act, Congress did not retreat from that understanding, but instead *expanded* the scope of Section 224 by extending the protections previously accorded only to "cable television system[s]" to apply to "provider[s] of telecommunications service" as well. 47 U.S.C. § 224(a)(4).[5] In connection with this expansion of Section 224, Congress made clear that (1) the rate structure for cable operators that "solely" provided "cable service" under the amended Section 224, would remain unaffected by the amendments to Section 224, *id.* § 224(d)(3), and (2) a slightly higher rate structure would apply for "telecommunications carriers" that used pole attachments "to provide telecommunications services," *id.* § 224(e)(1). These provisions merely grandfather the existing rate structure for attachments used "solely to provide cable service," *id.* § 224(d)(3), and ensure that there is a level playing field among entities that use pole attachments to provide "telecommunications services," *id.* § 224(e)(1).

---

[4] *Cf. Allen* v. *Grand Cent. Aircraft Co.*, 347 U.S. 535, 545 (1954) (applying the "natural presumption that Congress, in its subsequent actions, accepted [agency interpretation of a statute] as legitimate"); 2B N. Singer, *Sutherland Statutory Construction* § 49.09, at 108 (6th ed. 2000) (noting that legislature "impliedly adopts" a "contemporaneous interpretation of a statute, especially when made by an administrative body . . . charged with the duty of administering or enforcing that statute").

[5] *See also* 47 U.S.C. § 224(f) (expanding Section 224 to require utilities to "provide . . . non-discriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it").

Subsections (d) and (e), however, do not reveal any congressional intent to remove attachments that cable operators use to provide Internet service from the purview of Section 224(b). Simply put, when Congress dictated the mechanism that the Commission should employ when setting rates under two specific circumstances, Congress did not, by negative implication, divest the Commission of its established authority to ensure "just and reasonable" "rates, terms, and conditions" for pole attachments by cable operators that provide both traditional cable service and Internet service. Indeed, the decision below never suggests any plausible reason that Congress would have intended to dissuade cable entities from expanding their services to include Internet service. But that is precisely the effect of the court of appeals' decision that cable operators forfeit valuable regulatory protections under Section 224 if they provide Internet service to their subscribers.

2. Not only is the panel majority's decision wrong, but it also creates a conflict with the decision of the D.C. Circuit in *Texas Utilities Electric Co.* v. *FCC*, 997 F.2d 925 (D.C. Cir. 1993). In *Texas Utilities*, the D.C. Circuit affirmed the Commission's conclusion that its authority under Section 224 extended to ensuring "just and reasonable" "rates, terms, and conditions" for cable television systems that provided both traditional video programming and nonvideo communications. *Id.* at 927. In doing so, the D.C. Circuit noted that "[t]he pole attachments subject to the FCC's regulatory authority are defined as 'any attachment by a cable television system to a pole . . . owned or controlled by a utility.'" *Id.* at 929 (quoting 47 U.S.C. § 224(a)(4)). Specifically, the D.C. Circuit held that the FCC "arrived at a permissible construction, rational and consistent with the congressional purpose in enacting the [1978 Act]" when it concluded that it "may prohibit a utility from charging a cable television system operator an unregulated pole attachment rate because some cable attachments within the system are used to transmit

nonvideo communications." *Id.* at 927. In contrast, the panel below expressly "decline[d]" to adopt the D.C. Circuit's reasoning in *Texas Utilities*, Pet. App. 28a n.32, and held that Section 224 "does not authorize the FCC to regulate pole attachments for Internet service," *id.* at 29a.

3. To be sure, the panel majority argued that its decision could be reconciled with the D.C. Circuit's *Texas Utilities* ruling. But the panel's efforts to do so are unpersuasive and further highlight that the panel's decision is contrary to the language of Section 224 and the purposes underlying Section 224 and the 1996 Act. Specifically, the panel argued that "Congress, in 1996, amended [Section 224] to eliminate the ambiguity" confronted by the D.C. Circuit in *Texas Utilities*, and therefore it was "faced with an entirely different situation from that faced by the D.C. Circuit." Pet. App. 28a n.32. The panel contended that "[t]he new section 224(d)(3) states that 'solely cable services' receive regulated rents." *Id.* That conclusion should be rejected.

Contrary to the panel's decision, the "new section 224(d)(3)" does *not* state that "solely cable services" will receive regulated rents. Rather, Section 224(d)(3) provides that "any pole attachment used by a cable television system solely to provide cable service" will be governed by the rate structure set forth in Section 224(d). 47 U.S.C. § 224(d)(3). Similarly, Section 224(e)(1) provides that pole attachments "used by telecommunications carriers to provide telecommunications services" are governed by the rate formula set forth in subsection (e). As demonstrated above, these new provisions do not purport to divest the FCC of regulatory authority over "rates, terms, and conditions" of pole attachments in all other circumstances. *Id.* § 224(b)(1).

Congress' use of the word "solely" in subsection (d) simply distinguishes the rates applicable to cable service from those that will apply to attachments for "telecommunications" service in subsection (e). That is, the word "solely" was not intended to limit the FCC's authority under subsections (b)(1)

and (a)(4) to ensure "just and reasonable" rates for "any attachment." 47 U.S.C. § 224(a)(4), (b)(1). To read this language otherwise would require the conclusion that Congress sought to overrule the D.C. Circuit's decision in *Texas Utilities*, a result for which there is absolutely no support. Moreover, acceptance of that conclusion would lead to the absurd result that the 1996 Act's goal of encouraging the development and deployment of high-speed Internet services by cable operators, using the same cables and pole attachments for traditional cable video programming, was subordinate to the ability of utilities to charge whatever rate they want when cable operators offer Internet services, even though the transmission of Internet services on those cable lines imposes no new burden on the utility.

In short, nothing in the 1996 amendments either expressly or implicitly affects the scope of subsection (b), which grants the FCC authority to ensure "just and reasonable" "rates, terms, and conditions" of "pole attachments" nor subsection (a)(4), which still defines "pole attachment" to mean "any attachment by a cable television system . . . to a pole . . . owned or controlled by a utility." 47 U.S.C. § 224(a)(4), (b)(1). Put another way, the operative language of Section 224, as amended by the 1996 Act, is the same, in all material respects, as the language considered by the D.C. Circuit in *Texas Utilities*. Accordingly, the panel majority's decision regarding the scope of the FCC's authority under Section 224 is in direct conflict with a decision of the D.C. Circuit.

Further, the panel's analysis is entirely backwards because it presumes that the 1996 Act sought to *limit* the scope of the regulatory protections provided by Section 224 when, in fact, the 1996 Act *expanded* the reach of Section 224. Indeed, the panel's analysis cannot be reconciled with the 1996 Act, whose manifest goal is to eliminate the ability of entities to exercise monopoly control over essential bottleneck facilities that create barriers to competition for communications services. Of course, when construing a statute, this Court consid-

ers "the provisions of the whole law" including "its object and policy." *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 35 (1990). That is, the meaning of a statute "is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988).

The 1996 Act was designed to foster competition among communications service providers by reducing the restraints imposed by government-granted incumbent monopolies. Thus, under the 1996 Act, monopoly state telephone franchises were preempted, 47 U.S.C. § 253, incumbent local exchange carriers ("LECs") were required to share their networks with competitors, *id.* § 251(c)(3), local franchising authorities were limited in their ability to restrict local competition, *id.* § 541(b)(3)(B), and public utilities were freed of legal restrictions that prevented diversification into telecommunications, 15 U.S.C. § 79z-5c. As a result of the 1996 Act, "States may no longer enforce laws that impede competition, and incumbent LECs are subject to a host of duties to facilitate market entry." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). Apart from promoting competition by lowering barriers to market entry, in the 1996 Act, Congress also expressed a national policy "to promote the continued development of the Internet." 47 U.S.C. § 230(b)(1). Indeed, in Section 706 of the 1996 Act, Congress authorized the Commission, if it concludes that advanced telecommunications capability is not being deployed in a reasonable and timely manner, to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." *Id.* § 157, statutory note (b).

In light of these provisions, it strains credulity to suggest that Congress intended to limit the Commission's authority under Section 224 and thereby penalize "cable entities that choose to expand their services in a way that w[ould] contrib-

ute 'to promot[ing] competition in every sector of the communications industry,' as Congress intended in the 1996 Act." Pet. App. 63a-64a (¶ 31) (second alteration in original). This is particularly true because the bottleneck control over essential facilities possessed by utilities is in no way altered "when the cable operator seeks to provide additional service." *Id.* at 63a.

But even if the changes to Section 224 brought about by the 1996 Act could be deemed to render the scope of the Commission's authority ambiguous, then the Commission's reasonable interpretation must prevail. Indeed, this Court has highlighted that, far from being a model of clarity, the 1996 Act "is in many important respects a model of ambiguity." *Iowa Utils. Bd.*, 525 U.S. at 397. And, "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." *Id.* (citing *Chevron* v. *NRDC*, 467 U.S. 837, 842-43 (1984)).

4. Further, the development and availability of high-speed Internet services throughout the Nation, goals which the decision below undermines, are of surpassing national importance under the 1996 Act.

As Judge Carnes explained, "this is an important case that may affect every person who uses . . . Internet service in this country" because it establishes the law, nationwide, on "industry-shaping issues." Pet. App. 96a. Indeed, this case arises from consolidated petitions for review of the FCC's rules filed by power companies from around the country, see *supra* at 12, and, as Judge Carnes put it, "involves the competing interests of those companies, telephone companies, cable television companies, wireless communication companies, Internet service providers, and of course, consumers." Pet. App. 96a. Moreover, "'because this case arose on Hobbs Act review of FCC rules, it may present the last opportunity for *any* court to address the core, industry-shaping issues

presented here.'" *Id.*[6] As Judges Carnes noted, "[a] more national case could hardly be imagined." *Id.*

That assessment is well founded because the panel majority's decision places substantial private and public national interests in jeopardy. If permitted to stand, the panel majority's rejection of the FCC's rules will present cable operators throughout the country with a stark Hobson's choice. Having already invested billions of dollars to upgrade their facilities to provide two-way Internet services, the only way that these cable operators can ensure continued access at reasonable terms to essential bottleneck facilities is by declining to provide those high-speed Internet services to their subscribers. Alternatively, cable operators can continue to provide Internet service knowing that the controlling legal standard applied throughout the nation dictates that, by doing so, they will forfeit the regulatory protections provided by Section 224. See Pet. App. 29a.

But such exploitation by utilities of these bottleneck facilities is the precise concern to which Congress responded when it originally authorized the Commission to ensure that the "terms, rates, and conditions" of such arrangements were "just and reasonable." 47 U.S.C. § 224(b)(1) (1978). Indeed, the potential for such abuse has increased because, under the 1996 Act, utilities that are required to provide access to poles under Section 224 now may be authorized to compete against cable operators for the provision of Internet service. 15 U.S.C. § 79z-5c. In fact, "[a] growing number of public utilities" are competing directly with cable operators in the market for Internet services. *Section 706 Report*, 14 FCC Rcd at 2427 (¶ 55). Thus, it comes as no surprise that, after the panel entered its judgment, utilities informed cable operators

---

[6] The Hobbs Act provides, that "[t]he court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—(1) all final orders of the Federal Communications Commission . . . ." 28 U.S.C. § 2342.

that they intend to impose a 500 percent increase in the rent for access to their utility poles, and have argued that the Commission will no longer have jurisdiction over these rates where cable operators commingle Internet services with their traditional cable service. NCTA's Motion to Stay Mandate at 11, *Gulf Power Co.* v. *FCC*, No. 98-6222 (11th Cir. 2000). Resolution of this legal issue therefore will have an industry-defining effect on the cable industry's ability to develop high-speed Internet services.

Finally, the panel decision, if left uncorrected by this Court, runs headlong against Congress' express goal of continuing the development and deployment of Internet services. 47 U.S.C. § 230(b)(1); see also *Iowa Utils. Bd.*, 525 U.S. at 397 (noting that 1996 Act affects a "crucial segment" of the economy "worth tens of billions of dollars"). Specifically, Congress directed the FCC to "encourage the deployment on a reasonable and timely basis" of these high-speed (broadband) communications services, 47 U.S.C. § 157, statutory note (a), and gave the FCC authority to "remov[e] barriers to infrastructure investment" if such services are not being "deployed to all Americans in a reasonable and timely fashion," *id.* § 157, statutory note (b). In furthering that congressional command, the Commission has explained that "[w]idespread access to broadband capability can increase our nation's productivity and create jobs" as well as "meaningfully improve our educational, social, and health care services." *Section 706 Report*, 14 FCC Rcd at 2400-01, (¶ 2). The panel's decision undermines those goals by erecting a barrier to competition and "penaliz[ing] cable entities that choose to expand their services in a way that will contribute 'to promoting competition in every sector of the communications industry,' as Congress intended in the 1996 Act." Pet. App. 63a-64a (¶ 31).

5. Lastly, the importance of review is underscored in this case because the panel majority's decision was effectively insulated from en banc review. Because five of the twelve

active judges from the Eleventh Circuit were recused, the only way that a majority of all of the active judges (seven judges) could have ordered en banc review would have been if the author of the panel decision voted to have the en banc court hear his own case. Pet. App. 90a. As Judge Carnes explained, the rationale underlying the Eleventh Circuit's en banc rules suggests that these restrictive standards might be justified because "'[i]n cases of exceptional importance . . . it may be expected that the Supreme Court will grant certiorari and settle the question in issue.'" Pet. App. 96a (alteration in original) (quoting *Zahn* v. *International Paper Co.*, 469 F.2d 1033, 1041 (2d Cir. 1972)). This is just such a case.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DANIEL L. BRENNER
NEAL M. GOLDBERG
NATIONAL CABLE TELEVISION ASSOCIATION, INC.
1724 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 775-3550

PETER D. KEISLER *
PAUL J. ZIDLICKY
SIDLEY & AUSTIN
1722 Eye St., N.W.
Washington, D.C. 20006
(202) 736-8000

PAUL GLIST
JOHN D. SEIVER
GEOFFREY C. COOK
COLE, RAYWID & BRAVERMAN, L.L.P.
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 659-9750

Counsel for Petitioner

November 22, 2000

* Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT.

GULF POWER COMPANY; ALABAMA POWER COMPANY, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

TAMPA ELECTRIC COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

FLORIDA POWER & LIGHT COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

COMMONWEALTH EDISON COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

POTOMAC ELECTRIC POWER COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

TEXAS UTILITIES ELECTRIC COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

UNION ELECTRIC COMPANY, d.b.a. AMERENUE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

AMERICAN ELECTRIC POWER SERVICES CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

DUKE ENERGY CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

VIRGINIA ELECTRIC AND POWER COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

CAROLINA POWER & LIGHT COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

DUQUESNE LIGHT COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

DELMARVA POWER AND LIGHT,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

Nos. 98-6222, 98-2589, 98-4675, 98-6414, 98-6430, 98-6431, 98-6442, 98-6458, 98-6476 to 98-6478, 98-6485 and 98-6486.

April 11, 2000.

Petitions for Review of an Order of the Federal Communications Commission.

Before TJOFLAT and CARNES, Circuit Judges, and GARWOOD*, Senior Circuit Judge.

TJOFLAT, Circuit Judge:

The 1996 Pole Attachment Act, 47 U.S.C. § 224 (Supp.II. 1996) (the "1996 Act"), gives providers of cable and telecommunications services the right to attach wires to the poles of power and telephone companies. If the power and telephone companies will not accept the rent the providers offer to pay, the Federal Communications Commission (the "FCC" or "Commission") sets the rent. In *In re Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 F.C.C.R. 6777, 1998 WL 46987 (1998) (codified at 47 C.F.R. §§ 1.1401-1.1418 (1999)47 CFRS 1.1418 CFRLQ) [sic] ("*Report and Order*"), the FCC promulgated a formula

---

* Honorable Will L. Garwood, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

for computing that rent. The FCC also ruled (in the *Report and Order*) that the 1996 Act precluded utilities (power and telephone) from receiving rent for wires that were "overlashed" to wires previously attached to their poles;[1] that the 1996 Act gave it authority to regulate the placement of wireless communications equipment and attachments for Internet service on utility poles; and that the Act precluded utilities from receiving rent for unused wires contained within fiber optic cables, "dark fiber,"[2] attached to the poles.

In these consolidated petitions for review of the *Report and Order*, several power companies[3] (the "Petitioners") challenge the FCC's formula for determining rent on the ground that, when implemented, the formula will operate to take their property without just compensation, in violation of the Fifth Amendment. We decline to reach this takings claim, because it is not ripe. The Petitioners also challenge the FCC's other rulings. As to those rulings, we find unripe their challenge to the overlashing provision of the *Report and Order*; we hold that the FCC lacks authority to regulate the placement of

---

[1] Overlashing occurs when an attacher physically ties additional cables to cables already attached to a pole. *See Report and Order*, 13 F.C.C.R. 6777, 6805, 1998 WL 46987 (1998).

[2] Dark fiber is "bare capacity and does not involve any of the electronics necessary to transmit or receive signals over that capacity." *Report and Order*, 13 F.C.C.R. at 6810.

[3] The utilities involved in this proceeding either as petitioners or intervenors are Gulf Power Company, Alabama Power Company, Georgia Power Company, Southern Company Services, Tampa Electric Company, Potomac Electric Power Company, Virginia Electric & Power Company, Carolina Power & Light Company, Duquesne Light Company, Delmarva Power & Light Company, Public Service Electric & Gas Company, Houston Lighting & Power Company, Texas Utilities Electric Company, American Electric Power Service Corporation, Commonwealth Edison Company, Duke Energy Corporation, Union Electric Company, and Florida Power and Light Company.

wireless equipment on utility poles and attachments for Internet service; and that its decision regarding dark fiber constitutes a reasonable interpretation of the 1996 Act.

I.

A.

From its inception, the cable television industry has attached its cables to the utility poles of power and telephone companies.[4] They have done so because factors such as zoning restrictions, environmental regulations, and start-up costs have rendered other options infeasible. Despite this dearth of alternatives, the attachment agreements between cable television companies and utility companies have generally been voluntary. But, the lack of alternatives has given the power and telephone companies an advantage in negotiating attachment agreements: their monopoly in the supply of poles that could accommodate television cables has allowed them, in the past, to charge monopoly rents.

In an effort to solve the monopoly pricing problem, Congress, in 1978, enacted the Pole Attachment Act, Pub.L. 95-234, 92 Stat. 33 (1978) (codified at 47 U.S.C. § 224 (1994)) (the "1978 Act"), as an amendment to the Communications Act of 1934. The solution Congress articulated in that act was to specify a range of rents telephone and power companies could charge the cable television companies they allowed

---

[4] In 1978, when Congress decided to intervene as described in the text *infra*, approximately 95 percent of cable television wires were attached to utility poles because cable television companies owned less than 10,000 poles, compared to over ten million poles owned by the power and telephone companies. *See* S.Rep. No. 95-580, at 12-13 (1978), *reprinted in* 1978 U.S.C.C.A.N. 109, 120-21.

to attach to their poles.[5] Congress' solution, in the 1978 Act, did not, however, change the voluntary nature of the attachment arrangement. As before, the cable television companies had no right to attach; thus, utilities could reject a cable television company's offer to attach. As for the attachments already in place, the 1978 Act effectively changed their terms.[6] In the event the parties could not agree to the rent and conditions of an attachment, and the State chose not to regulate the terms of attachments, the FCC would settle the issue.[7]

The rule the FCC promulgated to implement its authority under the 1978 Act reflected its limited authority; that rule merely "provided complaint and enforcement procedures to ensure that rates, terms and conditions for cable television pole attachments [we]re just and reasonable." 47 C.F.R. § 1.1401 (1978). The rule set forth (1) the procedure for filing a complaint about rents or conditions of attachment, *see id.*;

---

[5] Congress expressed this range as:

> [N]ot less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

47 U.S.C. § 224(d)(1) (1994). This range is more commonly expressed as not less than the incremental cost of adding a particular attachment, nor more than the fully allocated costs of the pole.

[6] Since the 1978 Act did not give the cable television companies the right to attach, the utilities could have avoided the FCC's regulation of rent and conditions of attachment under the Act by canceling the existing arrangements, and having the attachments removed. For obvious reasons, the utilities did not take this step.

[7] The FCC already possessed regulatory authority over the telephone industry. *See* 47 U.S.C. § 151 (1994). The passage of the 1978 Act gave the FCC the authority to regulate power companies as well, albeit in the limited manner described in the text. *See* 47 U.S.C. § 224(a)-(c) (1994).

(2) factors to be considered by the administrative law judge in determining the lawfulness of the rent or conditions the utility sought, *see id.*; and (3) a formula for determining the maximum rent the utility could receive, *see* 47 C.F.R. § 1.1409. Under the formula, the maximum rent a utility could charge was the attacher's proportionate share[8] of the bare costs of maintaining the pole and the "carrying charges"[9] associated with the pole.

After the FCC promulgated its rule, several cable television companies in Florida filed complaints with the FCC, contending that Florida Power Corporation was charging them unreasonable rents to attach. *See FCC v. Florida Power Corp.*, 480 U.S. 245, 248-49, 107 S.Ct. 1107, 1110, 94 L.Ed.2d 282 (1987). The FCC agreed that the rents were unreasonable and set a lower rent. Florida Power appealed the FCC's decision to this court, which held that the rent the FCC had set effected a taking of Florida Power's property without just compensation. *Florida Power Corp. v. FCC*, 772 F.2d 1537, 1546 (11th Cir.1985). The Supreme Court reversed, holding that no taking occurred because Florida Power had voluntarily agreed to the cable companies' attachments. Had Congress, in the 1978 Act, required utilities to allow the attachments, a taking may have occurred, the court suggested. *See Florida Power Corp.* 480 U.S. at 251 n. 6, 107 S.Ct. at 1111 n. 6.

---

[8] The attacher's proportionate share equaled the amount of space occupied by the attacher divided by the amount of total "usable space."

[9] The FCC regulations do not define carrying charges, but according to *Black's Law Dictionary*, they are "[e]xpenses incident to property ownership, such as taxes and upkeep." *Black's Law Dictionary* 205 (7th ed.1999). The Department of Agriculture's regulations define carrying charges as incidental costs associated with storing a commodity before delivery under a sales contract, *see* 7 C.F.R. § 1488.2(f) (1999), and the Securities and Exchange Commission defines them in the leverage contract context as service and interest charges, *see* 17 C.F.R. § 31.4(*l*) (1999).

The *Florida Power* decision clarified two fundamental precepts underlying the 1978 Act and the FCC's implementing regulations: (1) the FCC had narrow authority under the 1978 Act; it could regulate the power companies only to ensure that, once they consented to an attachment, the conditions of attachment and the rent they were to receive were reasonable; and (2) the FCC's rent formula was not subject to judicial review under the Fifth Amendment's Takings Clause because the 1978 Act's voluntary attachment provision effected no taking for which just compensation would be due.

Not long after the Court decided *Florida Power*, Congress decided to foster competition in the cable television industry. To that end, it enacted the Cable Communications Policy Act of 1984, Pub.L. No. 98-549, 98 Stat. 2779 (1984) (codified at 47 U.S.C. §§ 521-559 (1994)) (the "Cable Act"). Prior to this enactment, cable television companies operated under exclusive franchises granted by a local government, usually a municipality. Because these franchises effectively gave the companies monopolies in the franchise territory, the local governments regulated the rates they could charge subscribers. *See* H.R.Rep. No. 98-934, at 23-24, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4660-61.[10] The approach Congress adopted to encourage competition was to eliminate the power of local governments to set rates for "basic" cable service. Congress realized that, in the short run at least, this would give incumbent cable operators the ability to charge their subscribers monopoly prices. Prices would decrease in the long run, however, as local governments granted additional franchises for a given territory. *See Johnson Enters., Inc. v. FPL*

---

[10] The local governments set the rates the cable companies could charge subscribers for "basic" services. Some states and the FCC set the rates the companies could charge for other services, such as Home Box Office. *See* H.R.Rep. No. 98-934, at 24 (1984); *reprinted in* 1984 U.S.C.C.A.N. at 4661.

Group, Inc., 162 F.3d 1290, 1296 (11th Cir.1998). New cable companies would be able to enter the market and compete with the incumbent cable company though, only if they could obtain utility pole attachments on the same terms as those given to the incumbent.

In addition to these new demands for pole space, a host of new telecommunications carriers (such as new long distance telephone carriers and wide area telephone service providers), which used wires to carry their signals, began calling on the power and telephone companies to lease them space. They did so because utility poles afforded the only feasible means for stringing their wires. Since the 1978 Act only regulated the rents utilities could charge cable television companies, many utilities demanded monopoly rents from telecommunications carriers. In an effort to alleviate this problem, Congress, in 1996, amended the 1978 Act to give entities providing telecommunications and cable television service the right to "nondiscriminatory access" to utility poles. *See* 47 U.S.C. § 224(f) (Supp. II 1996).[11] In the event the parties could not agree to the terms of the attachment, including the rent, the 1996 Act authorized the FCC to set "just and reasonable" terms. *See id.* § 224(b)(1).

The 1996 Act also (1) redefined "utility," changing the definition from "any person whose rates or charges are regu-

---

[11] Section 224(f) provides:

> (1) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.
>
> (2) Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a nondiscriminatory basis where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes.

lated by the Federal Government or a State" to "any person who is a local exchange carrier, or a electric, gas, water, steam, or other public utility;"[12] (2) redefined "pole attachment" to include attachments by providers of telecommunications service;[13] (3) directed the FCC to create a formula for determining the attachment rent a utility could charge a telecommunications service provider;[14] and (4) instructed utilities on how to apportion the costs of "unusable" and "usable" space on their poles among telecommunications service providers.[15]

---

[12] Both definitions of "utility" also require the ownership of poles, used at least in part, for wire communication. *Compare* 47 U.S.C. § 224(a)(1) (1994), *with* 47 U.S.C. § 224(a)(1) (Supp. II 1996). Thus, if an entity's poles do not have attachments that are transmitting "writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable or other like connection," 47 U.S.C. § 153(51) (Supp. II 1996), the entity is not a utility for purposes of the Act.

[13] *Compare* 47 U.S.C. 224(a)(4)[sic](1994), *with* 47 U.S.C. § 224(a)(4) (Supp. II 1996). The 1996 version of the Act defined telecommunications, telecommunications carrier, and telecommunications service as follows: "Telecommunications" is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received," 47 U.S.C. § 153(43) (Supp. II 1996); "telecommunications carrier" is any provider of telecommunications services, 47 U.S.C. § 153(44) (Supp. II 1996); "telecommunications service" is the "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of facilities used," 47 U.S.C. § 153(46) (Supp. II 1996).

[14] *See* 47 U.S.C. § 224(e)(1) (Supp. II 1996). For purposes of this opinion, the term "telecommunications service providers" includes cable television companies that provide telecommunications services in addition to cable services.

[15] *See* 47 U.S.C. § 224(e)(2), (3) (Supp. II 1996). Section 224(e)(2) requires utilities to apportion the costs of "unusable space" as follows:

> A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities

On February 6, 1998, the FCC promulgated regulations implementing its authority under the 1996 Act. *See Report and Order*, 13 F.C.C.R. 6777, 1998 WL 46987. In the *Report and Order*, the FCC interpreted section 224(f) of the 1996 Act to require that utility companies give Internet providers access to their poles because the Internet was a cable service. *See id.* at 6795-96. Further, it interpreted the language of section 224(a)(4), which states that pole attachment meant *any* attachment, and section 224(d)(3), which provides that the FCC's rate applied to *any* attachment by a telecommunications carrier, to mean that telephone and power companies would have to accept pole attachments for wireless telephone equipment. *See id.* at 6798-99; *see also infra* n.22. The agency also determined that the Act precludes utilities from receiving rent for overlashed wires unless those wires significantly increase the burden on the pole. *See id.* at 6807. Finally, the FCC interpreted the Act to prohibit utilities from receiving rent for dark fiber. *See id.* at 6810.

Having thus interpreted the scope of its authority, the FCC articulated formulas for determining the attachment rents utilities may charge telecommunications service providers. *See id.* at 6820-30. Until February 2001, the 1978 Act's maximum rent formula for cable providers applies to attachments by telecommunications service providers. After that,

---

so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

Section 224(e)(3) requires utilities to apportion the costs of "usable space" as follows:

> A utility shall apportion the costs of providing usable space among all entities according to the percentage of usable space required for each entity.

the maximum rent will equal the sum of the "unusable" and "usable" rate factors.[16]

In this amended rule, the FCC incorporated almost verbatim the complaint process articulated in its 1978 rule. *See* 47 C.F.R. §§ 1.1404, 1.1409 (1999). If the parties cannot agree to the rent or other terms of an attachment (or if the utility denies access to its poles), the party contending that the rent or other terms are unjust and unreasonable may petition the Commission to settle the matter. That party bears the burden of establishing a *prima facie* case that the other party's position is unjust and unreasonable.[17] If the complainant fails to make out a *prima facie* case, the FCC must dismiss its complaint, in which case the rent or conditions offered or demanded govern the transaction.[18] If a *prima facie* case is es-

---

[16] For poles, the "unusable space" factor = 2/3 x (the percentage of the total pole space that is unusable) x (the attacher's share of the bare costs of maintaining the pole) x (carrying charges). The "usable space" factor = (the percentage of total usable space occupied by the attacher) x (the percentage of total pole space that is usable) x (net costs of the bare pole) x (carrying charges). For conduits, the "unusable space" factor = 2/3 x (net linear costs of unusable space divided by the number of attachers) x (carrying charges). The "usable space" factor for conduits = 1/2 x (1 duct divided by the average number of ducts less adjustments for maintenance ducts) x (linear cost of usable conduit space) x (carrying charges). 47 C.F.R. §§ 1.1417, 1.1418 (1999); *Report and Order*, 13 F.C.C.R. at 6820-33.

[17] For example, if the party seeking attachment complains that the utility is demanding an unreasonable rent (i.e., more than the maximum allowed under the FCC's formula), it bears the burden of proving that the rent demanded is more than the fully allocated costs of the pole.

[18] It is possible that the Commission's disposition of a complaint—whether a dismissal or an order setting one or more terms—may turn out to be provisional if, after the decision issues, the putative attacher decides to withdraw its request for an attachment. In this opinion, we assume for sake of discussion that the putative attacher does not withdraw its request and abides by the Commission's decision.

tablished, the Commission determines the *maximum* just and reasonable rent allowed under the rule's formula. Then, it decides the specific just and reasonable rent the complainant should pay or receive for the attachment. This determination involves reviewing items such as costs, rate of return on investment, the utility's filings before state or federal regulatory agencies, and engineering studies, *see* 47 C.F.R. § 1.1404(g)(1)-(13) (1999), in addition to considering the maximum rent the FCC's formula yields. The FCC's final rate order, like any of its final orders, is then subject to judicial review under 47 U.S.C. § 402(a) (1994) (providing for judicial review of FCC orders) and 28 U.S.C. §§ 2342, 2344 (1994) (providing for judicial review of FCC orders in a United States Court of Appeals).

B.

In response to the FCC's *Report and Order*, power companies across the country filed petitions for review in various courts of appeals. On March 23, 1998, Gulf Power Company, Alabama Power Company, Georgia Power Company, and Southern Company Services filed a joint petition for review in the Eleventh Circuit Court of Appeals. On April 28, 1998, Florida Power & Light Company also filed a petition for review in the Eleventh Circuit. Subsequently, on May 8, 1998, Tampa Electric Company filed a petition for review in the Eleventh Circuit, and Potomac Electric Company filed a petition for review in the D.C. Circuit. The same day, Virginia Electric & Power Company, Duke Energy Company, and Carolina Power & Light Company filed petitions for review in the Fourth Circuit; Duquesne Light Company and Delmarva Power & Light Company filed in the Third Circuit; American Electric Power Service Corporation filed in the Sixth Circuit; Commonwealth Edison Company filed in the Seventh Circuit; and Union Electric Company filed in the Eighth Circuit. Finally, on June 17 and July 16, 1998, respectively, Houston Lighting & Power Company and Public Service Electric & Gas Company filed motions to intervene in the first case filed in the Eleventh Circuit. Their motions were granted on August 4, 1998, the same day we granted the FCC's motion to consolidate all of the petitions for review.

In their petitions for review, the Petitioners challenge (1) the implementation of the FCC's formula for computing attachment rents as a taking without just compensation; (2) the implementation of the FCC's overlashing interpretation as a taking without just compensation; (3) the FCC's authority to include wireless communications equipment within the 1996 Act's regulated rate framework; (4) the FCC's authority to include Internet service providers within the 1996 Act's regulated rate framework; and (5) the FCC's decision not to count dark fibers as separate attachments. We discuss each of these challenges below, in parts III-VI.

On the day Gulf Power Company and its co-plaintiffs filed their joint petition for review, Gulf Power and several other utilities[19] brought an action in the United States District Court for the Northern District of Florida seeking declaratory and injunctive relief. *See Gulf Power Co. v. United States*, 998 F.Supp. 1386 (N.D.Fla.1998). Contending that the range of rental compensation the 1996 Act provided would in every case operate to deny a utility just compensation, these plaintiffs sought a declaration that the 1996 Act was facially invalid under the Fifth Amendment Takings Clause, and a permanent injunction prohibiting the Commission from enforcing the 1996 Act. *See id.* at 1389. The plaintiffs also claimed that allowing the FCC to determine just compensation violated the Separation of Powers doctrine. The district court granted the United States' motion for summary judgment. It concluded that, although the 1996 Act authorized a taking of the plain-

[19] The other utilities were Alabama Power Company, Georgia Power Company, Duke Power Company, Mississippi Power Company, Ohio Edison Company, and Florida Power Corporation.

tiffs' property, it did not deny the plaintiffs just compensation. Rather, it provided a procedure—a proceeding before the Commission—for determining just compensation which did not violate the Separation of Powers doctrine because the Commission's decision was subject to judicial review. *See id.* at 1397-98.

The plaintiff utilities appealed. A panel of this court upheld the district court's conclusion that the 1996 Act authorized a taking of the plaintiffs' property, but declined to review the court's ruling on just compensation. That issue was not ripe for review because the plaintiffs had not shown that the 1996 Act would operate to deny them just compensation in every case. *See Gulf Power Co. v. United States*, 187 F.3d 1324, 1338 (11th Cir.1999) (*Gulf Power I*). Finally, the panel affirmed the district court's holding that allowing the FCC to determine just compensation in the first instance did not violate the Separation of Powers doctrine. *Id.* at 1332-37.

II.

In their petitions for review, the Petitioners do not present the same challenges the plaintiffs made in *Gulf Power I*. Instead of attacking the facial validity of the Act under the Fifth Amendment Takings Clause and the Separation of Powers doctrine, the Petitioners question the facial validity of several aspects of the FCC's *Report and Order*.

We review constitutional challenges to agency regulations *de novo*. *See Rural Tel. Coalition v. FCC*, 838 F.2d 1307, 1313 (D.C.Cir.1988); *see also* 5 U.S.C. § 706(2)(B) (1994). We use the two-step *Chevron* analysis to review agency interpretations of a statute. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *Legal Envtl. Assistance Found., Inc. v. EPA*, 118 F.3d 1467, 1473 (11th Cir.1997). Under *Chevron* step one, we determine whether Congress has spoken unambiguously to the question at issue. If it has, our inquiry ends;

we give effect to Congress' intent. *See Chevron*, 467 U.S. at 842-43, 104 S.Ct. at 2781. Under *Chevron* step two, if we determine that Congress' intent is ambiguous, we defer to a reasonable agency interpretation of Congress' intent. *See id.* at 843, 104 S.Ct. at 2781-82. In resolving whether an ambiguity exists, we use normal tools of statutory construction, without affording agency interpretations any deference. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, 107 S.Ct. 1207, 1221, 94 L.Ed.2d 434 (1987); *National Mining Ass'n v. Secretary of Labor*, 153 F.3d 1264, 1267 (11th Cir.1998).

III.

The Petitioners' primary challenge to the FCC's *Report and Order* is that the rate formula it establishes cannot pass muster under the Fifth Amendment Takings Clause. The Petitioners' challenge presents two separate questions: will the Commission's formula, when implemented, effect a taking of part of utility poles, and if so, will the formula operate to deny the utilities just compensation in every case.

The *Gulf Power I* panel decided that the 1996 Act authorized a taking of utilities property, but concluded that the issue of whether the statute would operate to deny just compensation in every case was not ripe for review. *See Gulf Power I*, 187 F.3d at 1338; *see also Abbott Lab. v. Gardner*, 387 U.S. 136, 148-49, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967). The panel's resolution of the takings issue constitutes binding precedent. *See Cargill v. Turpin*, 120 F.3d 1366, 1386 (11th Cir.1997). We therefore begin with the premise that the 1996 Act authorizes the Commission, when faced with a complaint filed by an entity providing cable television or telecommunications services, to take a utility's property. Thus, our answer to the first question the Petitioners pose is yes: when the Commission rules on a complaint, a taking may result.

The second question the Petitioners present is whether the Commission's formula will operate to deny utilities just com-

pensation in every case. *The Gulf Power I* panel held that the just compensation question, when raised in a facial challenge to the 1996 Act, was not ripe unless the plaintiffs could show that just compensation would be denied in all cases. The compensation limits—the maximum and minimum rents—that the Commission's rule prescribes mirror the compensation limits prescribed by the 1996 Act. *Compare* 47 U.S.C. § 224(b), (d)(1), *with* 47 C.F.R. § 1.1409. Under the 1996 Act, the lowest rent that may be considered just and reasonable is an amount equal to the incremental cost of adding the new attachment to the utility's pole; the highest rent that may be considered just and reasonable is an amount equal to the fully allocated costs of the pole. *See* 47 U.S.C. § 224(b), (d)(1). A rent that is higher or lower than these statutory limits would be unjust and unreasonable. Because the outer boundaries of the FCC's formula are identical to those of the 1996 Act, *Gulf Power I*'s ripeness standard binds us. Thus, we inquire whether the Petitioners have shown that the Commission's formula will always deny utilities just compensation.

In this case, we are not called upon to review an FCC determination that a utility provide pole space at a rent that does not amount to the just compensation mandated by the Takings Clause. All that is before us is a facial attack on the Commission's formula and the Petitioners' allegation that factors the Commission took into account in fashioning the formula could never provide just compensation. This is essentially the same argument the utilities made to the *Gulf Power I* panel. The panel's response was that the utilities failed to establish that "'no set of circumstances exists under which the Act would be valid.'" *Gulf Power I*, 187 F.3d at 1336 (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987)). Although the Petitioners posit circumstances in which the FCC's formula will deny just compensation, we are not confident, given the record at hand,

that the formula will deny just compensation in all cases. The Petitioners' facial challenge to the formula is therefore unripe, and we do not address it. *Gulf Power I*, 187 F.3d at 1338; *Cargill*, 120 F.3d at 1386.[20]

IV.

The Petitioners challenge the FCC's decision to include wireless carriers within the "nondiscriminatory access" provision of section 224(f), claiming that the FCC has no statutory authority to regulate wireless carriers under the 1996 Act.[21] We agree.

The FCC contends that Congress' frequent use of the word "any" in the 1996 Act indicates an intent to have the Commission broadly regulate pole attachments.[22] As long as an

---

[20] For the same reasons, the issue of whether mandatory overlashing effects a taking without just compensation is also not ripe for review. Utilities, under the FCC's rule, are required to allow overlashing of cables for no additional compensation unless the additional cables "significantly increase the burden on the pole." *Report and Order*, 13 F.C.C.R. at 6807. This regulatory exception essentially reflects the exception, sometimes called the "engineering and safety exception," present in the Act. *See* 47 U.S.C. § 224(f)(2). That exception did not prevent the *Gulf Power I* panel from finding that the 1996 Act authorized a taking, and neither does the regulatory exception prevent us from concluding that the FCC's overlashing rule authorizes a taking. Just compensation was too abstract to determine for the original statutory taking, and thus is also too abstract to determine for the taking authorized by the FCC's overlashing rule. *See Gulf Power I*, 187 F.3d at 1338; *see also Abbott Lab.*, 387 U.S. at 148-49, 87 S.Ct. at 1515.

[21] As stated in part II *supra*, questions of pure statutory construction fall within a *Chevron* step one analysis. We therefore owe no deference to an agency's construction of a statute. *See Cardoza- Fonseca*, 480 U.S. at 446, 107 S.Ct. at 1221; *National Mining Ass'n*, 153 F.3d at 1267.

[22] Specifically, the FCC cites Congress' use of the word "any" in the following two provisions:

attachment is made by a cable television company or a telecommunications service provider, the FCC contends, the attachment may be regulated under section 224(d) or (e), no matter what kind of attachment it is. This position is contrary to the Commission's narrow authority to regulate power companies. The FCC's organic statute does not give it authority to regulate power utilities. *See* 47 U.S.C. § 151 (1994) (creating the FCC to regulate interstate and foreign commerce in radio and wire communication). Congress placed power companies within the agency's regulatory authority for pole attachment purposes only. *See* 47 U.S.C. § 224(a)(1).

Section 224(a)(4) defines a pole attachment as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." A utility, according to section 224(a)(1) is "any person . . . who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications."[23] Read in combination,

---

> The term "pole attachment" means *any* attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

47 U.S.C. § 224(a)(4) (emphasis added).

> This subsection shall apply to the rate for *any* pole attachment used by a cable television system solely to provide cable service. Until the effective date of the regulations required under subsection (e) of this section, this subsection shall also apply to the rate for *any* pole attachment used by a cable system or *any* telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) to provide *any* telecommunications service.

47 U.S.C. § 224(d)(3) (emphasis added).

[23] The term "wire communications" is defined as "the transmission of writing, signs, signals, pictures, and sounds of all kinds *by aid of wire, cable, or other like connection* between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus,

these two provisions give the FCC authority to regulate attachments to poles used, at least in part, for *wire* communications, and by negative implication does not give the FCC authority over attachments to poles for *wireless* communications.[24]

That wires are integral to the FCC's authority is supported by the legislative history of the 1978 Act.[25] Congress' reason for passing it was that the Commission did not believe it had

---

and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." 47 U.S.C. § 153(51) (emphasis added).

[24] The fact that power companies that do not use their poles to transmit wire communications are not covered by the Act and the FCC's implementing regulations, *see supra* nn.12 & 23, further supports this narrow reading of the FCC's authority. The dissent takes issue with this reading of section 224, stating that we make more of the wire-based definition of utility than Congress intended. The dissent's reasoning is contrary to its own suggestion that we follow the straightforward statutory language of section 224. The language of section 224 plainly says that attachments may be made to poles used for wire communications; it says nothing about attachments for wireless communications.

[25] The statutory language of section 224 itself prohibits the FCC from regulating pole attachments for wireless communications; thus, we may end our review with that language. An understanding of the communications industry and Congress' attempts at regulating it helps one understand why Congress wrote section 224 to prohibit the FCC from regulating wireless communications. To provide this understanding, we use normal tools of statutory construction and eliminate any hint of ambiguity in the statutory language. *See Cardoza-Fonseca*, 480 U.S. at 432 n. 12, 107 S.Ct. at 1213 n. 12 ("As we have explained, the plain language of this statute appears to settle the question before us. Therefore, we look to the legislative history to determine only whether there is 'clearly expressed legislative intention' contrary to that language, which would require us to question the strong presumption that Congress expresses its intent through the language it chooses.") (quoting *United States v. James*, 478 U.S. 597, 606, 106 S.Ct. 3116, 3121, 92 L.Ed.2d 483 (1986)); *see also infra* n.39 (Carnes, J., dissenting).

authority to regulate power companies since pole attachment arrangements "d[id] not constitute communication by wire or radio." S.Rep. No.95-580, at 14, *reprinted in* 1978 U.S.C.C.A.N. at 122 (internal quotation marks omitted). The FCC reasoned that:

> The fact that cable operators ha[d] found in-place facilities convenient or even necessary for their businesses [wa]s not sufficient basis for finding that the leasing of those facilities [wa]s wire or radio communications. If such were the case, we might be called upon to regulate access and charges for use of public and private roads and right of ways essential for the laying of wire, or even access and rents for antenna sites.

Id. Before 1978, the FCC's regulatory authority did not extend to power companies because power companies did not use their poles primarily for communication by wire or radio. This hindered the growth of the cable television market. The FCC could regulate what telephone companies charged to attach, but could not regulate what the power companies charged to attach. Because telephone and power poles generally did not run side-by-side, the cable companies at times were forced to attach to power company poles instead of telephone poles, and to pay monopoly rents. To prevent the power companies from taking unfair advantage of their bottleneck facilities in this manner, Congress brought them under the FCC's regulatory umbrella, permitting "[f]ederal involvement in pole attachments matters . . . where space on a utility pole ha[d] been designated and [wa]s *actually being used for communications services by wire or cable*." *Id.* at 15, *reprinted in* 1978 U.S.C.C.A.N. at 123 (emphasis added). The reason Congress gave this pole attachment authority to the FCC was that the Commission already regulated all other aspects of the cable industry and cable companies were the only entities seeking to attach to poles in 1978.

In 1996, when Congress amended the 1978 Act, it once again expanded the FCC's jurisdiction; this time to include attachments by telecommunications service providers. Nothing in the legislative history indicates that the original purpose behind regulating utility poles—to prevent the telephone and power companies from charging monopoly rents to connect to their bottleneck[26] facilities—changed. Rather, the legislative history suggests the same thing the language alteration suggests: Congress wanted to allow telecommunications service providers, like the cable television companies before them, to attach to the utilities' bottleneck facilities without having to pay monopoly rents. *See* H. Rep. No. 104-204, at 92 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 58.

The Petitioners' poles are not bottleneck facilities for wireless carriers. Wireless attachments to poles "include an antenna or antenna clusters, a communications cabinet at the base of the pole, coaxial cables connecting antennas to the cabinet, concrete pads to support the cabinet, ground wires and trenching, and wires for telephone and electric service." *Report and Order*, 13 F.C.C.R. at 6799. Most of this equipment can be placed on any tall building, and the whole set-up requires more physical space then a wireline system. Further, wireless systems operate in a completely different way than do wireline systems. Wireline networks transmit through linear networks of cables strung between poles. Wireless networks, on the other hand, transmit through a series of concentric circle emissions that allow the network to continue working if one antenna malfunctions. Indeed, it is highly questionable whether there are any bottleneck facilities for wireless systems. What is beyond question is that utility poles are not bottleneck facilities for wireless systems.

---

[26] *See AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 388, 119 S.Ct. 721, 734, 142 L.Ed.2d 835 (1999) (defining bottleneck facilities as something akin to the essential facilities of antitrust law).

Because they are not, and because the 1996 Act deals with wire and cable attachments to bottleneck facilities, the act does not provide the FCC with authority to regulate wireless carriers.[27]

Although Congress did not give the FCC authority to regulate the placement of wireless carriers' equipment under section 224 (or any other section) of the Telecommunications Act of 1996, that statute did address, in part, such regulation by state and local governments. Section 332[28] states that "[t]he regulation of the placement, construction, and modification of personal wireless services facilities by any State or local government or instrumentality thereof—shall not unreasonably discriminate among providers of functionally equivalent services; and shall not prohibit or have the effect of prohibiting the provision of personal wireless service." Pub.L. No. 104-104, § 704(B)(i)(I),(II), 110 Stat. 149 (1996) (codified at 47 U.S.C. § 332(7)(B)(i)(I), (II)). The section goes on to require a state to act on requests to site wireless equipment within a reasonable time, to require a state to put its reasons for denying any such request in writing, and to limit the reasons a state can assert for determining where wireless carriers can locate their equipment. *See id.* § 704(B)(ii)-(iv) (codified at 47 U.S.C. § 332(7)(B)(ii)-(iv)). The specificity with which Congress addressed the siting of wireless equipment in section 332 indicates that it did not in-

---

[27] The FCC seemed to recognize that this might be the case when it stated that, "[t]here are potential difficulties in applying the Commission's rules to wireless pole attachments." *Report and Order*, 13 F.C.C.R. at 6799.

[28] The wireless communications section of the Telecommunications Act of 1996 follows the pole attachment section; as codified, however, the two sections do not follow one another. *Compare* Pub.L. No. 104-104, §§ 703, 704, 110 Stat. 149 (1996), *with* 47 U.S.C. §§ 224, 332 (Supp. II 1996).

tend that section 224 provide the FCC authority to regulate the placement of wireless carriers' equipment.

V.

Next, Petitioners challenge the FCC's statutory authority to regulate attachments for Internet service under the 1996 Act. As with wireless carriers, we agree that the FCC has no authority under that act to regulate Internet service providers. The 1996 Act allows the Commission to regulate the rates for cable service and telecommunications service; Internet service is neither.

The FCC argues that Internet service provided by a cable television system is either "solely cable services" or is subject to regulation under section 224(b)(1)'s mandate to "ensure that the rates, terms, and conditions [for pole attachments] are just and reasonable." *Report and Order*, 13 F.C.C.R. at 6795-96 (internal quotation marks omitted). To accept this argument requires us to disregard the unambiguous language of the 1996 Act, which we cannot do. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340-41, 117 S.Ct. 843, 846, 136 L.Ed.2d 808 (1997). The 1996 Act calls for the Commission to establish two rates for pole attachments.[29] One, described in section 224(d), applies to "any pole attachment used by a cable television system solely to provide cable service." 47 U.S.C. § 224(d)(3). The second rate applies to "charges for pole

---

[29] The dissent contends that our reading of section 224 ignores subsection (b)(1)'s mandate that the FCC provide just and reasonable rates for pole attachments. To the contrary, our reading gives effect to all parts of section 224 while the dissent's reading ignores the fact that subsections (d) and (e) narrow (b)(1)'s general mandate to set just and reasonable rates. The straightforward language of subsections (d) and (e) directs the FCC to establish two specific just and reasonable rates, one for cable television systems providing solely cable service and one for telecommunications carriers providing telecommunications service; no other rates are authorized.

attachments used by telecommunications carriers to provide telecommunications services." 47 U.S.C. § 224(e)(1). For the FCC to be able to regulate the rent for an attachment that provides Internet service then, Internet service must qualify as either a cable service or a telecommunications service.

Cable service, defined in section 522, is "the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. § 522(6)(A), (B) (1994 & Supp. II 1996).[30] The only difference between this definition of "cable service" and the definition included in the 1978 Act is the addition of the words "or use." According to the House Report accompanying the 1996 amendments, the inclusion of the words "or use" was meant to "reflect[ ] the evolution of video programming toward interactive services." H. Rep. No. 104-204, at 97, *reprinted in* 1996 U.S.C.C.A.N. at 64. This is the only sentence in the legislative history that attempts to explain Congress' change to the definition of "cable service." Although what it means to reflect an evolution of video programming toward interactive service is not exactly clear, it is clear from Congress' lack of discussion of this change that it was minor in both language and intent. If Congress by the addition of these two words meant to expand the scope of the "cable service" definition from its traditional video base to include all interactive services, video and non-video, it would have said so. Without any substantive comment, we will not read this minor

[30] Although section 522 states that its definitions apply only to that subchapter, we give words a consistent meaning throughout the statute unless otherwise instructed by Congress. *See Richards v. United States*, 369 U.S. 1, 11, 82 S.Ct. 585, 591-92, 7 L.Ed.2d 492 (1962) ("We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act.") (footnotes and internal quotations omitted); *Nipper v. Smith*, 39 F.3d 1494, 1515 (11th Cir.1994).

change to effectuate a major statutory shift. *See Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 318, 105 S.Ct. 3180, 3187, 87 L.Ed.2d 220 (1985) (stating that without substantive comment "it is generally held that a change during codification is not intended to alter the statute's scope") (citing *Muniz v. Hoffman*, 422 U.S. 454, 467-74, 95 S.Ct. 2178, 2185-89, 45 L.Ed.2d 319 (1975)). How then did the addition of the words "or use" alter the definition of "cable service"? The statute's plain language and Congress' one sentence explanation suggest that Congress expanded the definition to include services that cable television companies offer to their customers to allow them to interact with traditional video programming.[31]

Although the statute includes interaction with other programming—in addition to video programming—within the definition of "cable service," we cannot read the language "other programming" broadly to include Internet services. "Other programming" has been part of the definition of "cable service" since 1978, when the Internet was only a tool for researchers and the military, not a commodity that would require regulation. When Congress used this language then, it could not have intended it to cover Internet services provided by cable companies. Again, we will not radically expand the scope of the definition of "cable service" from a video base to an all-interactive-services base without some substantive indication from Congress that this is indeed its intent. *See Walters*, 473 U.S. at 318, 105 S.Ct. at 3187.[32]

[31] Video programming means "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(20).

[32] The Commission urges us to adopt the D.C. Circuit's reasoning in *Texas Utilities Electric Co. v. FCC*, 997 F.2d 925 (D.C.Cir.1993), in determining whether pole attachments used by a cable television company to provide Internet service are entitled to a regulated rent under the 1996

Furthermore, as an aside, we note that the FCC, itself, has defined the Internet as an information service, not as a cable service. *See In Re Fed.-State Joint Bd. on Universal Serv.*, 13 F.C.C.R. 11501 ¶ 66, 1998 WL 166178 ("Internet service providers themselves provide information services. . . ."). Thus, the FCC lacks statutory authority to regulate the Internet under the 1996 Act based on the theory that Internet service is a cable service.

The only remaining basis for the Commission's authority to regulate the Internet under the 1996 Act is to treat the Internet as a telecommunications service. *See* 47 U.S.C. § 224(d)(3), (e) (directing the Commission to develop a rate for telecommunications carriers providing telecommunications service). The FCC, however, did not raise that argument before us. Nor could it have because the FCC has specifically

---

Act. We decline to do so. The D.C. Circuit decided *Texas Utilities Electric Co.* before the 1996 amendments were enacted. Prior to 1996, section 224 instructed the FCC to set a reasonable rent for "any attachment by a cable television system." 47 U.S.C. § 224(a)(4), (d)(1) (1994). It did not specify the particular services of a cable television system that were entitled to a regulated rent. Because Congress, in passing the 1978 Act, did not specify whether it "place[d] greater emphasis on the type of service to be distributed over the attachment or the type of entity doing the attaching," *Texas Utils. Elec. Co.*, 997 F.2d at 930, the court found the statute ambiguous. The court, therefore, deferred to the FCC's interpretation that co-mingled services were covered by section 224. Today we are faced with an entirely different situation from that faced by the D.C. Circuit in *Texas Utilities Electric Co.* because Congress, in 1996, amended the Act to eliminate the ambiguity at issue in that case. The new section 224(d)(3) states that "solely cable services" receive regulated rents. (Telecommunications services, which also receive regulated rents are discussed in the text *infra*.) Because we now know that the statute emphasizes the type of service over the type of entity acquiring the attachment, we have no need to follow the reasoning of *Texas Utilities Electric Co.* Indeed, to follow that reasoning would be to disregard our duty under *Chevron* to give effect to Congress' unambiguous intent. *Chevron*, 467 U.S. at 842-43, 104 S.Ct. at 2781.

said that the Internet is not a telecommunications service. *See Report and Order*, 13 F.C.C.R. at 6795 ("The *Universal Service Order* concluded that Internet service is not the provision of a telecommunications service under the 1996 Act."); *In Re Fed.-State Joint Bd. on Universal Serv.*, 12 F.C.C.R. 87 ¶ 69 (1996) ("Internet service does not meet the statutory definition of a 'telecommunications service.' ").[33] Accordingly, there is no statutory basis for the FCC to regulate the Internet as a telecommunications service under the 1996 Act.

In sum, Congress, in the 1996 Act, authorized the FCC to develop rent formulas for attachments providing cable and telecommunications services. Internet service does not meet the definition of either a cable service or a telecommunications service. Therefore, the 1996 Act does not authorize the FCC to regulate pole attachments for Internet service.

VI.

The Petitioners' final challenge is to the FCC's statutory authority to regulate the rents utilities charge for dark fiber attachments. Dark fiber, which exists within a fiber optic cable, "consists of . . . bare capacity and does not involve any of the electronics necessary to transmit or receive signals over that capacity." *Report and Order*, 13 F.C.C.R. at 6810. The advantage of stringing cables with lit and dark fiber is that dark fiber provides excess distribution and transmittal capacity for a cable or telecommunications company to use as its

---

[33] The FCC has given the following examples of telecommunications services: cellular telephone and paging services; mobile radio services; operator services; PCS (personal communications services); access to interexchange service; special access; wide area telephone service (WATS); toll-free service; 900 service; MTS; private line; telex; telegraph; video services; satellite services; and resale services. *In re Fed.-State Joint Bd. on Universal Serv.*, 12 F.C.C.R. 8776 ¶ 780 (1997). Even if this list is not exhaustive, all of these examples are materially different from the Internet.

service network expands. Dark fiber also may be leased to a third party. Because dark fiber is bare capacity, it technically is neither a telecommunications service nor a cable service. In fact, it is not a service at all; it is simply an inactive fiber.

The 1996 Act authorizes the FCC to regulate the pole attachments of cable television and telecommunications companies that provide cable and telecommunications services. *See* 47 U.S.C. § 224; *supra* part V. The 1996 Act says nothing about regulating bare capacity. But, these bare capacity fibers do not generally exist on their own. They are usually located within cables that also contain fibers providing cable or telecommunications services, i.e., lit fibers the FCC clearly has the authority to regulate. Thus, unlike Internet service or wireless carriers, the statute's silence does not resolve the issue of whether the Commission may regulate dark fiber. Both Internet service and wireless carriers are similar to items the statute covers. The statute defines the kinds of attachers it covers, and wireless carriers do not fall within that definition. Similarly, the statute defines the types of wire services it covers, and Internet services are not one of those services. We can, therefore, say, based on the 1996 Act alone, that the FCC lacks the authority to regulate wireless carriers and the provision of Internet services. Dark fiber, however, is not a service (nor, of course, is it a type of attacher). Thus, the fact that it falls outside the definitions of "cable service" and "telecommunications service" tells us nothing about Congress' intent to regulate dark fiber. Congress did say that it did not intend to have an attacher pay twice for a single attachment, *see* H.R.Rep. No. 104-204, at 92, *reprinted in* 1996 U.S.C.C.A.N. at 59, but the legislative history does not indicate whether dark fiber and its host were to be considered a single attachment. Congress' intent is ambiguous; therefore, we proceed to step two of the *Chevron* analytical framework and consider whether the FCC reasonably interpreted Congress' silence on

dark fiber. *See Chevron*, 467 U.S. at 843, 104 S.Ct. at 2781-82.[34]

The FCC decided that dark fiber is not a separate attaching entity from its host attachment. *See Report and Order, 13* F.C.C.R. at 6811.[35] According to the FCC, dark fibers place no more burden on a pole than do their host attachments. *See id.* This makes sense since dark fiber, by definition, is merely bare capacity and is included within its host attachment at the time that cable is attached to the pole. Further, we presume that in determining the rent for the host attachment, the utility and the FCC will account for the dark fibers contained within the attaching host. By accounting for the dark fibers in the rent determination for the host cable, the Commission ensures that the utility receives just compensation for any burden the dark fiber may cause the pole at the time the host attaches. Hence, once the utility has been compensated, there is no reason to treat dark fiber as a separate attaching entity, and the FCC's decision not to do so is reasonable.[36]

---

[34] Our conclusion that Congress' intent is ambiguous is consistent with our conclusion that section 224 does not authorize the FCC to regulate wireless carriers or the provision of Internet services because, as we state in the text, wireless carriers and Internet service are similar in kind to the attachers and services the 1996 Act discusses. Dark fiber, however, is a different bird altogether. Neither the statute nor the legislative history discusses anything similar to dark fiber. Therefore, we cannot even begin to discern, let alone declare unambiguous, Congress' intent regarding dark fiber.

[35] Section 224(e)(2) directs a utility to "apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities," and section 224(e)(3) directs a utility to "apportion the cost of providing usable space among all entities." The FCC determined that dark fiber did not constitute a separate entity from its host attacher for purposes of sections 224(e)(2) and (3).

[36] Our ruling on dark fiber is narrow; holding only that it was reasonable for the FCC to consider pure dark fiber and its host as one attaching entity. We are not presented with a factual scenario involving dark fiber

VII.

For the foregoing reasons, we hold that the nondiscriminatory access provision of the 1996 Act authorizes a taking of a portion of the Petitioners' poles, which occurs when the FCC issues a rent determination order as to a particular pole or set of poles. Whether the rent formula developed by the FCC, including its decision not to require additional compensation for overlashed wires, provides just compensation is not ripe for review because it is not presented in a sufficiently concrete form for adjudication. Further, we hold that the FCC lacks the authority to regulate wireless carriers and the provision of Internet service under the 1996 Act. Finally, we hold that the FCC's decision not to count leased dark fiber as an additional attaching entity is reasonable.

SO ORDERED.

CARNES, Circuit Judge, concurring in part and dissenting in part:

On review in these cases is *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 F.C.C.R. 6777, 1998 WL 46987 (1998) ("*Order*"), the order of the Federal Communications Commission which implements the amendments to the Pole Attachment Act of 1978, 47 U.S.C. § 224, contained in the Telecommunications Act of 1996. Because I believe that the Pole Attachment Act of 1978, as amended, extends regulated rates to all pole attachments, including those used for wireless telecommunications service and Internet service, I dissent from the parts of the Court's decision reaching a contrary conclusion.

I do agree with the majority opinion's conclusions regarding the petitioners' facial attack on the rate formula prescribed in the *Order*. As this Court held in *Gulf Power Co. et*

---

that becomes lit, thus we do not address the status of such a fiber. Nor do we address dark fiber located within a cable whose attachment the FCC lacks authority to regulate under section 224(f).

al. v. United States, 187 F.3d 1324 (11th Cir.1999) ("*Gulf Power I*"), section 224(f), the statutory provision requiring utilities to accept pole attachments, effects a per se taking of property under the Fifth Amendment for which just compensation is required.[1] *Id.* at 1328-31. But the petitioners have failed to show that the *Order*'s rate formula will deny just compensation in every case. Consequently, their facial challenge to the formula is unripe and, as the majority opinion concludes, it should not be considered by this Court.[2] *Id.*

I disagree, however, with the majority opinion's holdings regarding wireless telecommunications service and Internet service. It concludes that the FCC has no authority to regulate either wireless telecommunications carriers or Internet service providers, but the plain language of the statute mandates the opposite conclusion.[3]

---

[1] Section 224(f) reads as follows:

> (1) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to pole, conduit, or right-of-way owned or controlled by it.
>
> (2) Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.

[2] Likewise, I agree with the majority opinion's conclusion regarding the petitioners' argument that the rate formula denies just compensation when wires are overlashed because no additional compensation is awarded. It is possible that in some cases the rate formula will provide just compensation for both the original attachment and the overlashed cables without additional compensation. Again, the petitioners have failed to show that the rate formula will deny just compensation in every case. Thus, their challenge is unripe.

[3] As noted in the majority opinion, we apply the two-step *Chevron* analysis to agency interpretations of a statute. *See Chevron U.S.A., Inc. v.*

Section 224(b)(1) provides that the FCC "shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." The term "pole attachment" is defined in section 224(a)(4) as "*any* attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." (emphasis added). As this Court has stated, more than once, "the adjective 'any' is not ambiguous; it has a well- established meaning." *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1186 (11th Cir.1997); *accord Lyes v. City of Riviera Beach, Florida*, 166 F.3d 1332, 1337 (11th Cir.1999) (en banc). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.' " *United States v. Gonzales*, 520 U.S. 1, 5, 117 S.Ct. 1032, 1035, 137 L.Ed.2d 132 (1997) (citations omitted) (as quoted in *Merritt*, 120 F.3d at 1186). Applying that definition to sections 224(a)(4) and (b)(1), the FCC has the authority to regulate *all* attachments, i.e., attachments "of whatever kind," *id.*, by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility. Obviously, *all* attachments includes those attachments used to provide wireless and Internet services.

The majority opinion does not attempt to justify its conclusions regarding wireless service with the language of the stat-

---

Natural Resources Defense Council, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). "First, the court is to determine if the intent of Congress is clear; if so, that is the end of the matter. On the other hand, if Congress has not spoken directly to the precise question at issue, a second step of review comes into play, and the court must determine whether the agency's answer to the question Congress left open reflects a permissible construction of the statute." *Jaramillo v. INS*, 1 F.3d 1149, 1152 (11th Cir.1993) (en banc). We use the normal tools of statutory construction to judge whether Congress' intent is clear. *See INS v. Cardoza Fonseca*, 480 U.S. 421, 446, 107 S.Ct. 1207, 1221, 94 L.Ed.2d 434 (1987) (quoting *Chevron*, 467 U.S. at 843 n. 9, 104 S.Ct. at 2782 n. 9).

ute, except to say that there is a "negative implication" created by the statutory definition of a pole attachment coupled with the definition of a utility.[4] But the negative implication, if there is one at all, is not nearly as strong as the majority seems to think. The statutory definition of utility serves merely to exempt from mandatory access any utility that does not make its poles available for wire communications at all. If a utility does not make its poles available for wire communications, it does not have to make its poles available for wireless communications. However, once a utility makes its poles available, even "in part," for wire communications, it is subject to mandatory access for all pole attachments. Nothing about the definition of utility negates the FCC's mandate to regulate rates for all pole attachments.

Notwithstanding the straightforward statutory language, the majority opinion turns to legislative history to justify its conclusion about wireless communications. But the Supreme Court, as well as this Court, has repeatedly held when the meaning of a statute is clear from its plain language, it is unnecessary to look to legislative history. *See Gonzales*, 520 U.S. at 6, 117 S.Ct. at 1035 ("Given the straightforward statutory command, there is no reason to resort to legislative history."); *Ratzlaf v. United States*, 510 U.S. 135, 147-48, 114 S.Ct. 655, 662, 126 L.Ed.2d 615 (1994) ("we do not resort to legislative history to cloud a statutory text that is clear"); *United States v. Paradies*, 98 F.3d 1266, 1288 (11th Cir.1996) ("Because the language in the statute is clear, it would be improper to look to the legislative history for clarification."). Because the statutory language at issue is unambi-

---

[4] Pole attachment is defined in section 224(a)(4) as "any attachment . . . to a pole, duct, conduit, or right-of-way owned or controlled by a utility." Utility is defined in section 224(a)(1) as "any person . . . who owns or controls poles, ducts, conduits, or rights-of- way used, in whole or in part, for any wire communications."

guous, resort to legislative history in order to undermine it is unnecessary and improper.

With respect to Internet service, the majority opinion concludes that the FCC has no authority to regulate it because Internet service is neither a cable service nor a telecommunications service, and is thus not covered by the rate formulas described in section 224(d) for "solely" cable services and in section 224(e) for telecommunications services. But the majority opinion fails to address the section 224(b)(1) mandate that the FCC "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable. . . ." Because pole attachment is defined as "any attachment," and because of the unambiguous definition of "any," section 224(b)(1) requires the FCC to ensure just and reasonable rates for all pole attachments, including those used to provide Internet service.

Finally, I agree with the majority opinion's conclusion that the FCC has the authority to regulate dark fiber and that the FCC's decision not to treat dark fiber as a separate attaching entity is reasonable. For reasons I have already discussed, dark fiber is within the definition of pole attachment, and it is therefore within the FCC's regulatory authority. The FCC's decision to treat dark fiber and its host attachment as one attaching entity is reasonable, because, as the majority opinion notes, "dark fiber, by definition, is merely bare capacity and is included within its host attachment at the time that cable is attached to the pole."

The problem is how the majority opinion reaches the conclusion that the FCC is authorized to regulate dark fiber. It does so by concluding that because dark fiber is neither a cable service nor a telecommunications service, the statute is ambiguous. But the same majority opinion also concludes that because Internet service is neither a cable service nor a telecommunications service, the statute is unambiguous and Internet service is outside the FCC's regulatory authority.

The majority cannot have it both ways—either the statute unambiguously gives the FCC the authority to regulate only cable and telecommunications services, or the statute is ambiguous about whether the FCC has authority to regulate more than cable and telecommunications services. My view is consistent: The statute unambiguously gives the FCC authority to regulate any and all pole attachments. The majority opinion's view is not consistent.

Because I believe that the statute unambiguously gives the FCC regulatory authority over wireless telecommunications service and Internet service, I dissent from those parts of the majority opinion holding to the contrary.

APPENDIX B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

CS Docket No. 97-151

IN THE MATTER OF

IMPLEMENTATION OF SECTION 703(E)
OF THE TELECOMMUNICATIONS ACT OF 1996
AMENDMENT OF THE COMMISSION'S RULES
AND POLICIES GOVERNING POLE ATTACHMENTS

REPORT AND ORDER

Adopted: February 6, 1998 Released: February 6, 1998
By the Commission:

[¶¶1-35]

* * * *

I. INTRODUCTION

1. In this *Report and Order* ("*Order*"), the Commission adopts rules implementing Section 703 of the Telecommunications Act of 1996 ("1996 Act")[1] relating to pole attachments.[2] Section 703 requires the Commission to

---

[1] Pub. L. No. 104-104, 110 Stat. 61, 149-151, codified at 47 U.S.C. § 224.

[2] Section 703 amended Section 224 of the Communications Act. Currently Section 224 defines "pole attachment" as any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit or right-of-way owned or controlled by a utility. 47 U.S.C. § 224(a)(4). Section 224 defines "utility" as any person who is a local exchange carrier or an electric, gas, water, steam or other public utility, and who owns or controls poles, ducts, conduits or rights-of-way used, in whole or in part, for any wire communications, not including any railroad, any person who is cooperatively organized, or any person owned by the federal government or any state. 47 U.S.C. § 224(a)(1).

prescribe regulations to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services.[3] Section 703 also requires that the Commission's regulations ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments.[4] We adopt the rules set forth in Appendix A hereto based upon the comments and reply comments filed in response to the *Notice of Proposed Rulemaking* in this docket (the "*Notice*").[5] A list of commenters, as well as the abbreviations used in this *Order* to refer to such parties, is contained in Appendix B hereto. The commenters generally represent the interests of one of the following three categories: (1) utility pole owners;[6] (2) cable operators;[7] and (3) telecommunications carriers.[8]

---

[3] 47 U.S.C. § 224(e)(1).

[4] *Id.*

[5] *Notice of Proposed Rulemaking*, CS Docket No. 97-151, 12 FCC Rcd 11725 (1997). In addition, to the extent relevant, we have considered the comments and reply comments filed in response to the *Notice of Proposed Rulemaking* in CS Docket No. 97-98 relating to the existing formula for pole attachments. *Notice of Proposed Rulemaking*, CS Docket No. 97-98 (Amendment of Rules and Policies Governing Pole Attachments), 12 FCC Rcd 7449 (1997) ("*Pole Attachment Fee Notice*"). The *Pole Attachment Fee Notice* specifically seeks comment on the Commission's use of the current presumptions, on carrying charge and rate of return elements of the formula, on the use of gross versus net data and on a conduit methodology.

[6] Commenting utility pole owners generally include American Electric, et al., Carolina Power, et al., Colorado Springs Utilities, New York State Investor Owned Electric Utilities, Dayton Power, Duquesne Light, Edison Electric/UTC, Ohio Edison, Texas Utilities and Union Electric.

[7] Commenting cable operator interests generally include Adelphia, et al., New York Cable Television Assn., Comcast, et al., NCTA, SCBA and Summit.

[8] Commenting telecommunications carrier interests generally include Ameritech, AT&T, Bell Atlantic, BellSouth, Champlain Valley Telecom,

II. BACKGROUND

2. The purpose of Section 224 of the Communications Act[9] is to ensure that the deployment of communications networks and the development of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers.[10] The rules we adopt in this *Order* further the pro-competitive goals of Section 224 and the 1996 Act by giving incumbents and new entrants in the telecommunications market fair and non-discriminatory access to poles and other facilities, while safeguarding the interests of the owners of those facilities.

3. As originally enacted, Section 224 was designed to ensure that utilities' control over poles and rights-of-way did not create a bottleneck that would stifle the growth of cable television. Congress sought to prohibit utilities from engaging in "unfair pole attachment practices . . . and to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public."[11] As mandated by Section 224, the Commission established a formula to calculate maximum rates that utilities could charge cable operators for the installation of attachments on utility facilities where such rates are not regulated by a state.[12] In subsequent

---

et al., GTE, ICG Communications, KMC Telecom, MCI, Omnipoint, RCN, SBC, Sprint, Teligent, USTA, U S West and Winstar.

[9] Pub. L. No. 95-234 ("1978 Pole Attachment Act") codified at Communications Act of 1934, as amended ("Communications Act"), § 224, 47 U.S.C. § 224.

[10] S. Rep. No. 580, 95th Cong., 1st Sess. 19, 20 (1977) ("*1977 Senate Report*"), *reprinted in* 1978 U.S.C.C.A.N. 109, 121.

[11] *Id.*

[12] *First Report and Order* (Adoption of Rules for the Regulation of Cable Television Pole Attachments), CC Docket No. 78-144, 68 FCC 2d

proceedings the Commission amended and clarified its methodology for establishing rates and its complaint process.[13]

4. The 1996 Act amended Section 224 in several important respects. While previously the protections of Section 224 had applied only to cable operators, the 1996 Act extended those protections to telecommunications carriers as well.[14] Further, the 1996 Act gave cable operators and telecommunications carriers a mandatory right of access to utility poles, in addition to maintaining a scheme of rate regulation governing such attachments.[15] In the *Local Competition Order*, we adopted a number of rules implementing the new access provisions of Section 224.[16]

1585 (1978) ("*First Report and Order*"); *see also Second Report and Order*, 72 FCC 2d 59 (1979) ("*Second Report and Order*"); *Third Report and Order*, 77 FCC 2d 187 (1980) ("*Third Report and Order*"), *aff'd Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1985) (per curiam); *Report and Order*, CC Docket No. 86-212 (Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles), 2 FCC Rcd 4387, 4387-4407 (1987) ("*Pole Attachment Order*"), *recon. denied*, 4 FCC Rcd 468 (1989).

[13] *Second Report and Order*, 72 FCC 2d 59; *Memorandum Opinion and Order* (Petition to Adopt Rules Concerning Usable Space on Utility Poles, RM 4556), FCC 84-325 (released July 25, 1984) ("*Usable Space Order*"); *see also Alabama Power Co. v. FCC*, 773 F.2d 362 (D.C. Cir. 1985) (upholding challenge to the Commission's pole attachment formula relating to net pole investment and carrying charges). Following *Alabama Power*, the Commission revised its rules in the *Pole Attachment Order*, 2 FCC Rcd 4387.

[14] 47 U.S.C. § 224.

[15] 47 U.S.C. § 224(a), (f).

[16] *First Report and Order*, CC Docket No. 96-98 (Implementation of the Local Competition Provisions in the Telecommunications Act of 1996), 11 FCC Rcd 15499, 16058-107, paras. 1119-1240 (1996) (the "*Local Competition Order*"), *rev'd on other grounds, Iowa Utilities Board*

5. As amended by the 1996 Act, Section 224 defines a utility as one "who is a local exchange carrier or an electric, gas, water, steam, or other public utility and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for wire communications." [17] The 1996 Act, however, specifically excluded incumbent local exchange carriers ("ILECs") from the definition of telecommunications carriers with rights as pole attachers.[18] Because, for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier, an ILEC must grant other telecommunications carriers and cable operators access to its poles, even though the ILEC has no rights under Section 224 with respect to the poles of other utilities. This is consistent with Congress' intent that Section 224 promote competition by ensuring the availability of access to new telecommunications entrants.[19]

6. Section 224 contains two separate provisions governing maximum rates for pole attachments, one of which covers attachments used to provide cable service and one of which covers attachments for telecommunications services (including attachments used jointly for cable and telecom-

---

v. FCC, 120 F.3d 753 (8th Cir. 1997), *cert. granted sub nom., AT&T Corp. v. Iowa Utilities Board*, 66 U.S.L.W. 3387, 66 U.S.L.W. 3484, 66 U.S.L.W. 3490 (U.S. Jan. 26, 1998) (No. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, 97-1411). In August 1996, the Commission also issued a *Report and Order* in CS Docket No. 96-166 (Implementation of Section 703 of the Telecommunications Act of 1996), 11 FCC Rcd 9541 (1996), amending its rules to reflect the self-effectuating additions and revisions to Section 224.

[17] 47 U.S.C. § 224(a).

[18] 47 U.S.C. § 224(a)(5).

[19] *Conference Report to S. 652 and Joint Explanatory Statement of the Committee of Conference*, 104th Cong., 2d Sess. 98-100, 113 ("*Conf. Rpt.*").

munications). Section 224(b)(1), which was not amended by the 1996 Act, grants the Commission authority to regulate the rates, terms, and conditions governing pole attachments for cable service to ensure that they are just and reasonable.[20] Section 224(d)(1) defines a just and reasonable rate as ranging from the statutory minimum (incremental costs) to the statutory maximum (fully allocated costs).[21] Incremental costs include pre-construction survey, engineering, make-ready and change-out costs incurred in preparing for cable attachments.[22] Fully allocated costs refer to the portion of operating expenses and capital costs that a utility incurs in owning and maintaining poles that is equal to the portion of usable pole space that is occupied by an attacher.[23]

7. Separately, Section 224(e)(1), the subject of this *Order*, governs rates for pole attachments used in the provision of

---

[20] *Cf.* 47 U.S.C. § 224(c)(1). The Commission does not have authority where a state regulates pole attachment rates, terms, and conditions. Section 224(c)(3) directs that jurisdiction for pole attachments reverts to the Commission generally if the state has not issued and made effective rules implementing the state's regulatory authority over pole attachments. Reversion to the Commission also occurs, with respect to individual cases, if the state does not take final action on a complaint within 180 days after its filing with the state, or within the applicable period prescribed for such final action in the state's rules, as long as that prescribed period does not extend more than 360 days beyond the complaint's filing. 47 U.S.C. § 224(c)(3).

[21] 47 U.S.C. § 224(d)(1).

[22] "Make-ready" generally refers to the modification of poles or lines or the installation of guys and anchors to accommodate additional facilities. *See 1977 Senate Report* at 19. A pole "change-out" is the replacement of a pole to accommodate additional users. *Pole Attachment Order*, 2 FCC Rcd at 4405 n.3. Congress expected pole attachment rates based on incremental costs to be low because utilities generally recover the make-ready or change-out charges directly from cable systems. *See 1977 Senate Report* at 19.

[23] *Id.* at 19-20.

telecommunications services, including single attachments used jointly to provide both cable and telecommunications service. Under this section, the Commission must prescribe, no later than two years after the date of enactment of the 1996 Act, regulations "to govern charges for pole attachments used by telecommunication carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges." [24] Section 224(e)(1) states that such regulations "shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for such pole attachments." [25] The section also sets forth a transition schedule for implementation of the new rate formula for telecommunications carriers. Until the effective date of the new formula governing telecommunications attachments, the existing pole attachment rate methodology of cable services is applicable to both cable television systems and to telecommunications carriers.[26]

8. In the *Notice*, the Commission sought comment on implementing a methodology to ensure just, reasonable, and nondiscriminatory maximum pole attachment and conduit [27] rates for telecommunications carriers.[28] Under the present

---

[24] 47 U.S.C. § 224(e)(1). The 1996 Act was enacted on February 8, 1996.

[25] *Id.*

[26] 47 U.S.C. § 224(d)(3); 47 C.F.R. § 1.1401. Pursuant to Section 224(d)(3), the current formula will continue to be applicable to cable systems providing only cable service and, until February 8, 2001, to cable systems and telecommunications carriers providing telecommunications services. See Section VI below regarding the implementation and the effective date of the rules we adopt herein.

[27] A conduit is a pipe placed in the ground through which cables are pulled. FCC ARMIS Operating Data Report, FCC Report 43-08 (January 1992).

[28] *Notice*, 12 FCC Rcd at 11739-40, paras. 36-41.

formula, a portion of the total annual cost of a pole is included in the pole attachment rate based on the portion of the usable space occupied by the attaching entity.[29] Under the 1996 Act's amendments, the portion of the total annual cost included in the pole attachment rate for cable systems and telecommunications carriers providing telecommunications services will be determined under a more delineated method. This method allocates the costs of the portion of the total pole cost associated with the usable portion of the pole and the portion of the total pole cost associated with the unusable portion of the pole in a different manner. The Commission also sought comment on how to ensure that rates charged for use of rights-of-way are just, reasonable, and nondiscriminatory.[30]

9. The rules we adopt today implement the plain language of Section 224. That section provides that the regulations promulgated will apply "when the parties fail to resolve a dispute over such charges." [31] Accordingly, and as discussed below, we encourage parties to negotiate the rates, terms, and conditions of pole attachment agreements. Although the Commission's rules will serve as a backdrop to such negotiations, we intend the Commission's enforcement mechanisms to be utilized only when good faith negotiations fail. Based on the Commission's history of successful implementation and enforcement of rules governing attachments used to provide cable service, we believe that the new rules we adopt today will foster competition in the provision of communications services while guaranteeing fair compensation for the utilities that own the infrastructure upon which such competition depends.

---

[29] *See Third Report and Order*, 77 FCC 2d 187 (1980).

[30] *Notice*, 12 FCC Rcd at 11740, paras. 42-43.

[31] 47 U.S.C. § 224(e)(1).

III. PREFERENCE FOR NEGOTIATED AGREEMENTS AND COMPLAINT RESOLUTION PROCEDURES

A. *Background*

10. The 1996 Act amended Section 224 by adding a new subsection (e)(1) to:

> . . . govern the charges for pole attachments used by telecommunications providers to provide telecommunications services when the parties fail to resolve a dispute over such charges. Such regulations shall ensure that a utility charges just, reasonable and nondiscriminatory rates for pole attachments.[32]

The statute, [33] legislative policy, [34] administrative authority, [35] and current industry practices [36] all make private negotiation the preferred means by which pole attachment arrangements are agreed upon between a utility pole owner and an attaching entity.[37] Pursuant to the Commission's authority to provide

---

[32] 47 U.S.C. § 224(e)(1).

[33] 47 U.S.C. §§ 224(b)(1), (d)(1), (e)(1).

[34] *1977 Senate Report* at 19-20; *Conf. Rpt.* at 205-207.

[35] *First Report and Order*, 68 FCC 2d 1585 (setting initial rules for the complaint process, formula elements and the use of historical costs); *Second Report and Order*, 72 FCC 2d 59 (setting spatial presumptions and defined incremental and fully allocated costs for use in formula); *Third Report and Order*, 72 FCC 2d 187, *aff'd Monongahela Power Co. v. FCC*, 655 F.2d 1254; *Pole Attachment Order*, 2 FCC Rcd 4387, *recon. denied*, 4 FCC Rcd 468.

[36] *See, e.g.*, Carolina Power, et al., Comments at 11; NCTA Comments at 4-7; USTA Reply at 2.

[37] From 1979, when the first pole attachment complaint was filed with the Commission, to 1991, approximately 246 pole attachment complaints were filed. From 1991 through 1996, approximately 44 such complaints were filed. Currently, there are seven pole attachment complaints under review by the Commission's Cable Services Bureau. We view this

for just, reasonable, and nondiscriminatory rates, terms and conditions for pole attachments,[38] attaching entities have recourse to the Commission when unable to resolve a dispute with a utility pole owner. The Commission's rules establish a specific complaint process.[39] Under the current rule, in reviewing a complaint about rates, the Commission will compare the utility's proposed rate to a maximum rate calculated using the statutory formula.[40]

11. In proposing a methodology to implement Section 224(e), the Commission stated in the *Notice* that the Commission's role is limited to circumstances when the parties fail to resolve a dispute and that negotiations between a utility and an attacher should continue to be the primary means by which pole attachment issues are resolved.[41] The Commission also indicated that Congress recognized the importance of access in enhancing competition in telecommunications markets and that parties in a pole attachment negotiation do not have equal bargaining positions.[42] To further Congressional intent to foster competition in telecommunications, the Commission proposed to apply to telecommunications carriers the Commission's existing complaint rules developed to resolve pole attachment rate disputes between cable operators and utilities.[43]

---

number of complaints to the Commission, in light of the penetration of cable service in the nation's communities, to be indicative that most pole attachment rates are negotiated without resort to the Commission.

[38] 47 U.S.C. §§ 224(b)(1), (e)(1), (f)(1).

[39] 47 C.F.R. §§ 1.1401-1.1416.

[40] 47 U.S.C. § 224(d)(1).

[41] *Notice*, 12 FCC Rcd at 11731, para. 12.

[42] *Id.*

[43] *Id.* The current complaint rule provides that "[t]he complaint shall include a brief summary of all steps taken to resolve the problem prior to

12. Some telecommunications carriers and utility pole owners agree that negotiations between a utility and an attaching entity will continue, under Section 224(e), to be the primary means by which pole attachment issues are resolved.[44] Several utility pole owners, however, suggest a number of changes to the complaint process, such as adding a mandatory negotiation period and establishing a statute of limitations and a minimum amount in controversy.[45] American Electric, et al., also contend that meaningful negotiations can occur "only when the default pricing mechanism established by the Commission is somewhere close to the price on which the parties would agree absent such regulation."[46] Attaching entities respond that the American Electric, et al., proposals would eliminate recourse to the Commission, contrary to the content and spirit of the law.[47]

---

filing. If no such steps were taken, the complaint shall state the reason(s) why it believed such steps were fruitless." 47 C.F.R. § 1.1404(i).

[44] *See* Bell Atlantic Reply at 2 (negotiation is essential means to establish just and reasonable rates for pole attachments); Carolina Power, et al., Reply at 11 (private negotiations are the cornerstone of attachment agreements); GTE Comments at 4-5; USTA Reply at 2. *But see* MCI Comments at 2 (formula for maximum rate is a necessary condition to making negotiations, and therefore industry resolution of disputes, possible at all).

[45] *See* American Electric, et al., Reply at 30; Carolina Power, et al., Comments at 18-19; Duquesne Light Comments at 18-20; Edison Electric/UTC Comments at 7; GTE Reply at 4-5; USTA Comments at 2.

[46] American Electric, et al., Comments at 12-13. American Electric, et al., believe that any default pricing formula established pursuant to Section 224(e) should be based on Forward-Looking Economic Pricing Model based on economic capital costs. American Electric, et al., Comments at 13,39 and CS Docket No. 97-98 Comments at 4, 42-46, 91-94.

[47] *See, e.g.*, NCTA Reply at 4; *see also* Association for Local Telecommunications Services CS Docket No. 97-98 Comments at 2; USTA CS Docket No. 97-98 Reply at 6.

13. The Association of Local Telecommunications Services ("ALTS")[48] asserted in its comments in response to the *Pole Attachment Fee Notice* that its members have experience attempting to obtain pole attachments from numerous utilities,[49] and many negotiations were unsatisfactory in part due to the intransigence by or blatant refusal of utilities to negotiate.[50] USTA, a national trade association representing over 1,000 LECs,[51] contends that while the most efficient manner to determine just and reasonable pole attachment rates is that of permitting pole owners and attachers to negotiate reasonable agreements,[52] the proposal by American Electric, et al., contravenes the statute.[53]

14. Electric utility pole owners oppose the continued use of the current negotiation process and complaint procedures established for cable operators, claiming the current regulatory scheme has resulted in government-sponsored unilateral contract modification and subsidization of the cable industry by the electric utility ratepayer.[54] American Electric, et al., contend that the Commission must recognize that the bargaining relationship between electric utilities and cable companies has changed since 1978 when Congress provided the cable television industry with access to the distribution

---

[48] ALTS is a national trade association representing over 30 telecommunications carriers that are facilities based competitive local exchange carriers ("CLECs"). ALTS CS Docket No. 97-98 Comments at 1.

[49] ALTS CS Docket No. 97-98 Comments at 2.

[50] *Id.*

[51] USTA Comments at 1.

[52] USTA CS Docket No. 97-98 Comments at 2.

[53] USTA CS Docket No. 97-98 Reply at 5-6.

[54] *See, e.g.*, American Electric, et al., Comments at 18-20.

poles of utilities at just and reasonable rates.[55] In asserting that attaching entities no longer represent an industry that needs rate regulation under Section 224,[56] American Electric, et al., acknowledge that in 1978 "Congress was concerned with the cable companies' inferior bargaining position vis-a-vis utilities and wanted to assist an industry in its infancy."[57] USTA interprets Congressional intent as expecting the Commission to intervene and rely on the statutory formula only in instances where negotiating parties are unable to reach a mutually acceptable agreement.[58] USTA further states that the Commission has established and maintained a case-by-case dispute resolution process since 1978, rather than adopting a uniform pole attachment rate prescription process in compliance with that Congressional mandate.[59] Cable and telecommunications carriers assert that potential and existing attaching entities do still need pole attachment rate regulation because they are still not able to bargain from a level position with utility pole owners.[60] Cable operators

---

[55] American Electric, et al., CS Docket No. 97-98 Comments at 8 (stating that since 1977, the cable industry has grown to a 67% coverage of homes in America, citing *Third Annual Report*, CS Docket No. 96-133 (In the Matter of Annual Assessment of Status of Competition in the Market for Delivery of Video Programming), 12 FCC Rcd 4358, 4368, para. 14 (1997)); *see also* American Electric, et al., Reply at 5.

[56] American Electric, et al., CS Docket No. 97-98 Comments at 23.

[57] *Id.*

[58] USTA CS Docket No. 97-98 Comments at 2 (quoting the *1977 Senate Report* at 3 ("The basic design of S. 1547, as reported, is to empower the [Commission] to exercise regulatory oversight over the arrangements between utilities and [cable television] systems in any case where the parties themselves are unable to reach a mutually satisfactory arrangement")).

[59] USTA CS Docket No. 97-98 Comments at 2.

[60] *See* Comcast, et al., Reply at 16; NCTA Reply at 3-6; New York Cable Television Assn. at 2-3; Teligent Reply at 5-6.

and telecommunications carriers urge the Commission to extend the existing negotiation and complaint resolution system to telecommunications carriers.[61]

15. Some attaching entities suggest that the Commission impose on itself a 90-day time frame in which to issue a decision on a pole attachment complaint.[62] Other cable and telecommunications carriers request that the Commission impose upon utility pole owners the requirement that pole attachment agreements between private parties be on public record so that an attaching entity will have notice of: (1) the expectations of the utility; and (2) the terms provided to other attaching entities.[63] The result would be that the most favored provisions from various agreements would then be available to all attaching entities.[64] Pole owners assert that attaching entities have no legitimate expectation that all provisions be available to all attaching entities.[65]

---

[61] *See, e.g.*, AT&T Comments at 2, Reply at 4; Champlain Valley Telecom, et al., Reply at 6 (objecting to attitude of American Electric, et al., reminding the Commission that its authority is not plenary); Comcast, et al., Reply at 16; NCTA Reply at 3-6. *Cf.* New York Cable Television Assn. at 2-3 (current rule gives utility pole owner too much leverage); Teligent Reply at 5-6 (sole reliance on negotiations is not enough).

[62] *See* Ameritech Reply at 3-4 (complaint process should provide for expeditious resolution of disputes); KMC Telecom Comments at 5-6 (90 days for the Commission to resolve complaints as a means to workable solutions).

[63] *See* ICG Communications Comments at 16, Reply at 1-2; KMC Telecom Comments at 5-6.

[64] *See* ICG Communications Comments at 16.

[65] *See* American Electric, et al., Reply at 34; Duquesne Light Comments at 19; Edison Electric/UTC Comments at 6-7; Ohio Edison Comments at 18; Union Electric Comments at 17.

B. *Discussion*

16. Our rules for complaint resolution will only apply when the parties are unable to arrive at a negotiated agreement.[66] We affirm our belief that the existing methodology for determining a presumptive maximum pole attachment rate, as modified in this *Order*, facilitates negotiation because the parties can predict an anticipated range for the pole attachment rate.[67] We further conclude that the current complaint procedures are adequate to establish just and reasonable rates, terms, and conditions for pole attachments.[68] No party has demonstrated that the Commission's time for resolution has been a problem in the past. While we will not impose a deadline for Commission action, we will continue to endeavor to resolve complaints expeditiously. An uncomplicated complaint process and a clear formula for rate determination are essential to promote the use of negotiations for pole attachment rates, terms, and conditions.[69] We are committed to an environment where attaching entities have enforceable rights, where the interests of pole owners are recognized, and where both parties can negotiate for pole attachment rates, allowing the availability of telecommunications services to expand.

---

[66] *See* American Electric, et al., Comments at 15; AT&T Comments at 2; Bell Atlantic Reply at 2; Carolina Power, et al., Reply at 11; GTE Reply at 5; MCI Comments at 2; NCTA Comments at 3-4; New York State Investor Owned Electric Utilities Comments at 6; USTA Reply at 2.

[67] *See, e.g.*, AT&T Reply at 4; ICG Communications Comments at 11; MCI Comments at 2; NCTA Comments at 3-4; *see also* Ameritech Reply at 3-5 (favors transparent maximum rate determinations); GTE Reply at 4-5 (uniform and transparent rate formula facilitates private negotiations); KMC Telecom Reply at 1-2 (clear formula and complaint process supports negotiation).

[68] *See* AT&T Comments at 2; MCI Comments at 2; NCTA Comments at 3-4.

[69] *See* GTE Reply at 4-5.

17. We agree with attaching entities that time is critical in establishing the rate, terms, and conditions for attaching.[70] Prolonged negotiations can deter competition because they can force a new entrant to choose between unfavorable and inefficient terms on the one hand or delayed entry and, thus, a weaker position in the market on the other.[71] For these reasons, we reject a proposal by utilities that we mandate a 180-day negotiation period prior to filing a complaint with the Commission. We agree with cable and telecommunications carriers that such a requirement would not be conducive to a pro-competitive, deregulatory environment.[72] Such an extended period of time could delay a telecommunications carrier's ability to provide service and unnecessary obstruct the process.[73]

18. We disagree with utilities suggesting that, in addition to the existing time frames, the pole owner should receive 30 days' notice by a cable operator or telecommunications carrier of any intention to file a complaint.[74] Such a notice requirement would be redundant under our rule and would unnecessarily prolong the resolution of disputes. The current rule provides for a 45-day period in which the utility pole

---

[70] *See* AT&T Reply at 4; Ameritech Reply at 3; ICG Communications Comments at 11; MCI Reply at 3.

[71] *See* AT&T Reply at 4 (time is of the essence in negotiation); Ameritech Reply at 3-4 (the Commission should provide for expeditious resolution so that market entry is not delayed); ICG Communications Comments at 11 (timing is important); MCI Reply at 3 (time to market is critical).

[72] *See* ICG Communications Reply at 2-3; KMC Telecom Reply at 4; MCI Reply at 2-3.

[73] *But see* Duquesne Light Comments at 18; Edison Electric/UTC Comments at 7; Carolina Power, et al., Comments at 18-19.

[74] *See* American Electric, et al., Reply at 30; Edison Electric/UTC Reply at 6; GTE Comments at 4-5; USTA Comments at 2, Reply at 4.

owner must respond to the request for access filed by a cable operator or telecommunications carrier seeking to install an attachment.[75] A complaint to the Commission must be filed within 30 days of the denial of a request for access.[76] The utility then has an additional 30 days to respond to the complaint.[77] When a cable operator or a telecommunications carrier believes it has cause to complain that a pole attachment rate, term, or condition is not just or reasonable, [78] a detailed set of data and information is required under the current rule.[79] A utility has 30 days in which to respond to an attaching entity's request for the data and information regarding the rate, term, or condition required for the complaint.[80] Under the present rules, the utility has had communication with the attaching entity prior to the filing of the complaint, to such a degree as is necessary to understand the issues in conflict outlined in the complaint. The utility has sufficient notice of the issues involved, making additional notice requirements unnecessary.

19. GTE suggests that we impose a one year statute of limitations on the filing of a complaint and suggests an amount in controversy threshold of $5,000.[81] We view these proposals as unnecessarily restrictive as they could foreclose remedy of an unjust or unreasonable rate, term, or condition of pole attachments, especially for small enterprises.[82] There

---

[75] 47 C.F.R. § 1.1403(b).

[76] 47 C.F.R. § 1.1404(k).

[77] 47 C.F.R. § 1.1407(a).

[78] 47 U.S.C. §§ 224(b)(1), (d)(1), (e)(1).

[79] 47 C.F.R. §§ 1.1404(g)(1-12), (h), (i).

[80] 47 C.F.R. § 1.1404(h).

[81] *See* GTE Comments at 4-5.

[82] *See generally*, SCBA Reply.

is no provision in the statute for such restrictions. Establishing a threshold of any dollar amount could preclude relief to small entities and would be inconsistent with Section 257 and the pro-competitive goals of the 1996 Act.[83]

20. Utility pole owners must provide access to attaching entities on a non- discriminatory basis.[84] While we do not agree that all pole attachment agreements have to be identical, differing provisions must not violate the statutory requirement that terms be just, reasonable, and nondiscriminatory. We believe that these statutory standards are enforceable under the current rule.

21. We believe it is implicit in our current rule [85] that all parties must negotiate in good faith for non-discriminatory access at just and reasonable pole attachment rates.[86] In the *Local Competition Order*, the Commission addressed the requirement of Section 251 that requires an ILEC to provide interconnection and other rights to new entrants, and observed that new entrants have little to offer the

---

[83] 47 U.S.C. § 257. This section requires the Commission to eliminate market entry barriers for entrepreneurs and other small businesses in the provision or ownership of telecommunication services or in the provision of parts or services to telecommunications providers.

[84] 47 U.S.C. § 224(f)(1).

[85] 47 C.F.R. § 1.1404.

[86] In furtherance of our original mandate to institute an expeditious procedure for determining pole attachment rates with a minimum of administrative costs and consistent with fair and efficient regulation, we adopted a program for non-discriminatory access to poles, ducts, conduits and rights-of-way in the *Local Competition Order*. 11 FCC Rcd at 16059, para. 1122 (citing the *1977 Senate Report* at 19). In the *Notice*, the Commission affirmed its interpretation of Congressional intent that negotiations between a utility and an attacher should continue to be the primary means by which pole attachment issues are resolved. *See Notice*, 12 FCC Rcd at 11731, para. 12; *see also* 47 U.S.C. § 224(f)(1).

incumbent.[87] Rather, these new competitors seek to reduce the incumbent's subscribership and weaken the incumbent's dominant position in the market. An ILEC is likely to have scant, if any, economic incentive to reach agreement.[88] In the *Local Competition Order*, the Commission determined that a utility stood in a position vis-a-vis the competitive telecommunications provider seeking pole attachment agreements that was virtually indistinguishable from that of the ILEC with respect to a new entrant seeking interconnection agreements under Sections 251 and 252 of the 1996 Act.[89] We find that a utility's demand for a clause waiving the licensee's right to federal, state, or local regulatory relief would be per se unreasonable and an act of bad faith in negotiation. In particular, a request that a pole attachment agreement include a clause waiving statutory rights to file a complaint with the Commission is per se unreasonable.[90]

---

[87] 11 FCC Rcd at 15570, para. 141.

[88] *Id.* The Commission continued, determining that a request by an incumbent that a new entrant contractually waive its legal rights or remedies could constitute a violation of the duty to negotiate in good faith imposed by Sections 251(c)(1) and 252, stating: "We reject the general contention that a request by a party that another party limit its legal remedies as part of a negotiated agreement will in all cases constitute a violation of the duty to negotiate in good faith. A party may voluntarily agree to limit its legal rights or remedies in order to obtain a valuable concession from another party. . . . [W]e find that it is a per se failure to negotiate in good faith for a party to refuse to include in an agreement a provision that permits the agreement to be amended in the future to take into account changes in Commission or state rules. Refusing to permit a party to include such a provision would be tantamount to forcing a party to waive its legal rights in the future." *Id.* at 15576, para. 152.

[89] *See id.* at 15570, para. 141.

[90] *See* Letter from Meredith J. Jones, Chief, Cable Services Bureau to Danny E. Adams, Esq., Kelley Drye & Warren LLP, DA No. 97-131 (January 17, 1997).

IV. CHARGES FOR ATTACHING

A. *Poles*

1. Formula Presumptions

22. In determining a just and reasonable rate, two elements of the pole are examined: usable space and other than usable space. The costs relating to these elements are allocated to those using the pole. In the *Second Report and Order*, consistent with Section 224(d)(2), the Commission defined total usable space as the space on the utility pole above the minimum grade level[91] that is usable for the attachment of wires, cables, and related equipment.[92] This determination was based upon survey results, consideration of the National Electric Safety Code ("NESC"), and practical engineering standards used in constructing utility poles. The Commission found that "the most commonly used poles are 35 and 40 feet high, with usable spaces of 11 to 16 feet, respectively."[93] The Commission recognized the NESC guideline that 18 feet of the pole space must be reserved for ground clearance[94] and that six feet of pole space is for setting the depth of the pole.[95] To avoid a pole by pole rate calculation, the Commission adopted rebuttable presumptions of an average pole height of 37.5 feet, an average amount of usable space of 13.5 feet, and an average amount of 24 feet of unusable space on a pole. The Commission established a rebuttable presumption of one foot as the amount of space a cable television attachment

---

[91] In this context, minimum grade level generally refers to the ground level or elevation above which distances are measured for determining required clearances.

[92] *See* 72 FCC 2d at 69; 47 C.F.R. § 1.1402(c).

[93] 72 FCC 2d at 69.

[94] *Id.* at 68, n.21.

[95] *Id.*

occupies.[96] These presumptions serve as the premise for calculating pole attachment rates under the current formula.

23. A group of electric utilities filed a white paper ("*White Paper*") in anticipation of the *Notice* and the *Pole Attachment Fee Notice*[97] in which they suggest that an increase in the current presumptive pole height is appropriate. The *White Paper* asserts that over time, and with increased demand, the average pole height has increased to 40 feet. At the same time, the *White Paper* contends that the usable space presumption should be reduced from 13.5 feet to 11 feet.[98] The Commission sought comment on these presumptions in the *Pole Attachment Fee Notice* and sought further comment in the *Notice* to establish a full record for attachments made by telecommunications carriers under the 1996 Act.[99]

24. We will address changing the existing presumptions in the *Pole Attachment Fee Notice* rulemaking.[100] Until resolution of that proceeding, we will apply our presumptions as they presently exist and proceed with the implementation under the 1996 Act of a methodology used in the provision of

---

[96] *Id.* at 69-70.

[97] *See White Paper* filed by the law firm of McDermott, Will and Emery on August 28, 1996, on behalf of the American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Florida Power and Light Company, Northern States Power Company, The Southern Company and Washington Water Power Company.

[98] *Id.* at 11.

[99] *Notice*, 12 FCC Rcd at 11733, para. 17.

[100] *See Pole Attachment Fee Notice*, 12 FCC Rcd at 7458-59, paras. 18-20. We reserve decision on issues regarding the 37.5 ft. presumptive pole height, the 13.5 ft. presumptive amount of usable space, the minimum ground clearance amount, the allocation of the 40-inch safety space, and the exclusion of 30 ft. poles from the calculation of costs of a bare pole and the determination as to whether such poles lack a sufficient amount of usable space to accommodate multiple attachments.

telecommunications services by telecommunications carriers and cable operators.

25. The *Notice* also sought comment on an issue raised by Duquesne Light in its reconsideration petition of the Commission's decision in the *Local Competition Order* proceeding.[101] Duquesne Light advocates that the number of physical attachments of an attaching entity is not necessarily reflective of the burden on the pole, and therefore of the costs relating to the attachment. Duquesne Light states that varying attachments place different burdens on the pole and proposes that any presumption include factors addressing weight and wind loads.[102] We will address whether any presumptions should reflect these factors in the *Pole Attachment Fee Notice* rulemaking.

2. Restrictions on Services Provided over Pole Attachments

26. In the *Notice*, we sought comment on whether the Commission's decision in *Heritage Cablevision Associates of Dallas, L.P. v. Texas Utilities Electric Company* ("*Heritage*")[103] should be extended.[104] In *Heritage*, a cable operator provided traditional cable services as well as nontraditional services through its facilities. Those facilities consisted of coaxial cable lashed to aerial support strands and fiber optic cable overlashed to the aerial support strands.[105]

---

[101] *Notice*, 12 FCC Rcd at 11733, para. 18 (citing *Local Competition Order*, 11 FCC Rcd at 16058-107, paras. 1119-1240); *see also* Duquesne Light CC Docket No. 96-98 Comments at 17-18.

[102] Duquesne Light CC Docket No. 96-98 Comments at 17-18.

[103] 6 FCC Rcd 7099 (1991), *recon. dismissed*, 7 FCC Rcd 4192 (1992), *aff'd sub nom. Texas Utilities Electric Co. v. FCC*, 977 F.2d 925 (D.C. Cir. 1993).

[104] *Notice*, 12 FCC Rcd at 11731, para. 13.

[105] *Heritage*, 6 FCC Rcd at 7100.

The nontraditional services provided by the cable operator consisted of non-video broadband communications services, including data transmission services.[106] The pole owner attempted to charge the cable operator an additional, unregulated rate for those poles with pole attachments supporting the facilities transmitting both video signals and data.[107]

27. In *Heritage*, which was decided prior to the 1996 Act, the Commission determined that the provision by a cable operator of both traditional cable services and nontraditional services on a commingled basis over a single network within the cable operator's franchise area justified only a single, regulated pole attachment charge by the utility pole owner.[108] The Commission affirmed its longstanding view of cable as a provider of video and nonvideo broadband services and determined that its pole attachment authority includes nonvideo broadband services under Section 224. The Commission stated that its jurisdiction under Section 224 was not limited by definitions emanating from the Cable Communications Policy Act of 1984 ("Cable Act of 1984") [109] because such definitions apply only for purposes of Title VI.[110] Further, it stated that, even when Section 224 is read in conjunction with the Cable Act of 1984, the Cable Act of 1984 and its legislative history indicate that a cable system providing both video and nonvideo broadband services is not excluded from the benefits of Section 224.[111]

---

[106] *Id.*

[107] *Id.*

[108] *Id.* at 7107.

[109] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (Oct. 30, 1984).

[110] *Heritage*, 6 FCC Rcd at 7103-04.

[111] *Id.* at 7104. The U.S. Court of Appeals for the District of Columbia Circuit upheld the Commission's decision on appeal because it was

28. Whether *Heritage* continues to apply raises significant issues as cable operators expand into new service areas, such as Internet services. Generally, commenters disagree as to the applicability of *Heritage* since the passage of the 1996 Act amendments to Section 224. Some utility pole owners contend that *Heritage* has been overruled by the 1996 Act, but they do not agree as to the effect of the overruling. Some of the utility pole owners argue that the new Sections 224(d)(3) and 224(e) create a new regime requiring new rules,[112] and therefore *Heritage* is no longer applicable. Some of these commenters also argue that, after the year 2001, a cable company is entitled to the old incremental rate under Section 224(d)(3) if the pole attachment is used solely to provide cable services. They contend that the use of a cable attachment to provide nonvideo services in addition to video would not be an attachment used solely for cable service and such attachment would be subject to the Section 224(e) telecommunications services rate.[113] Other utility pole owners argue that the provision of services other than cable and telecommunications services are outside the scope of Section 224 and are therefore not subject to the Commission's jurisdiction.[114] They contend

---

"consistent with the congressional purpose to avoid abusive pole attachment practices by utilities for the FCC to regulate any attachment by a cable operator within its franchise area and within its cable television system." *Texas Utilities v. FCC*, 977 F.2d at 936.

[112] Texas Utilities Reply at 2; GTE Comments at 8; USTA Comments at 4.

[113] Edison Electric/UTC Comments at 9.

[114] American Electric, et al., Comments at 11 (citing *Report and Order*, CC Docket No. 96-45 (In the Matter of Federal-State Joint Board on Universal Service), 12 FCC Rcd 8776 ("*Universal Service Order*"), 9176, para. 781); Duquesne Light Comments at 21; Ohio Edison Comments at 20; Union Electric Comments at 19.

that such services will be subject to market place negotiations.[115]

29. Cable operators generally contend that *Heritage* has not been overruled by the 1996 Act. They also contend that high speed Internet access is a cable service and an operator offering such service should not be assessed the Section 224(e) telecommunications services rate.[116] Telecommunications carriers generally agree that *Heritage* has not been overruled, and therefore the pre-1996 Act rules continue to provide that a utility should not charge different pole attachment rates based on the type of service provided by the cable operator, and further that a utility should be prohibited from placing unreasonable restrictions on the use of pole attachments by permitted attachers.[117] Some of the telecommunications carriers, however, oppose any extension of *Heritage*, arguing that such extension would provide preferential treatment for cable operators.[118] At least one telecommunications carrier argues that the distinctions established by Congress effectively overrule *Heritage* and that cable operators providing additional services besides video service are to be treated as telecommunications carriers under Section 224.[119]

30. We disagree with the utility pole owners who assert that the *Heritage* decision has been "overruled" by the passage of the 1996 Act insofar as it held that a cable system

---

[115] Duquesne Light Comments at 21; Ohio Edison Comments at 20; Union Electric Comments at 19.

[116] Comcast, et al., Comments at 18; NCTA Comments at 6-7, n.9; New York Cable Television Assn. Comments at 8.

[117] RCN Comments at 5-6; Sprint Comments at 2, Reply at 1-2 (citing MCI Comments at 4-5); U S West Comments at 4-5.

[118] MCI Comments at 6.

[119] *See* Ameritech Comments at 4.

is entitled to a Commission-regulated rate for pole attachments that the cable system uses to provide commingled data and video. The definition of "pole attachment" does not turn on what type of service the attachment is used to provide. Rather, a "pole attachment" is defined to include any attachment by a "cable television system."[120] Thus, the rates, terms and conditions for all pole attachments by a cable television system are subject to the Pole Attachment Act.[121] Under Section 224(b)(1), the Commission has a duty to ensure that such rates, terms, and conditions are just and reasonable.[122] We see nothing on the face of Section 224 to support the contention that pole owners may charge any fee they wish for Internet and traditional cable services commingled on one transmission facility.

31. The history of Section 224 further supports our conclusion. The purpose of the amendments to Section 224 made by the 1996 Act was similar to the purpose behind Section 224 when it was first enacted in 1978, *i.e.*, to remedy the inequitable position between pole owners and those seeking pole attachments.[123] The nature of this relationship is not altered when the cable operator seeks to provide additional service. Thus, it would make little sense to conclude that a cable operator should lose its rights under Section 224 by commingling Internet and traditional cable services. Indeed, to accept contentions that cable operators expanding their services to include Internet access no longer are entitled to the benefits of Section 224 would penalize cable entities that choose to expand their services in a way that will contribute "to promot[ing] competition in every

---

[120] 47 U.S.C. § 224(a)(4).

[121] 47 U.S.C. § 224(b)(1).

[122] *Texas Utilities v. FCC*, 977 F.2d at 934-35.

[123] *1997 Senate Report* at 19, 20.

sector of the communications industry," as Congress intended in the 1996 Act.[124]

32. Having decided that cable operators are entitled to the benefits of Section 224 when providing commingled Internet and traditional cable services, we next turn to the appropriate rate to be applied. We conclude, pursuant to Section 224 (b)(1), that the just and reasonable rate for commingled cable and Internet service is the Section 224(d)(3) rate. In specifying this rate, we intend to encourage cable operators to make Internet services available to their customers.[125] We believe that specifying a higher rate might deter an operator from providing non-traditional services. Such a result would not serve the public interest. Rather, we believe that specifying the Section 224(d)(3) rate will encourage greater competition in the provision of Internet service and greater benefits to consumers.

33. We emphasize that our decision to apply the Section 224(d)(3) rate is based on our regulatory authority under Section 224(b)(1). Several commenters suggested that cable operators providing Internet service should be required to pay the Section 224(e) telecommunications rate.[126] We disagree. The *Universal Service Order* concluded that Internet service is not the provision of a telecommunications service under the

---

[124] Preamble to the 1996 Act; *see also* 142 Cong. Rec. S687-01, S687 (daily ed. February 1, 1996) (Statement of Sen. Hollings).

[125] We have, through social contracts, encouraged cable operators to provide Internet services to their customers. *See Social Contract for Continental Cablevision*, 10 FCC Rcd 299 (1995), *amended by* 11 FCC Rcd 11118 (1996); *Social Contract for Time Warner*, 11 FCC Rcd 2788 (1995), *amended by* FCC Rcd 3099 (1995), *further amended by* 12 FCC Rcd 14881(1996).

[126] *See, e.g.*, Ameritech Comments at 4; Edison Electric/UTC Comments at 9-10; GTE Comments at 6; MCI Comments at 6.

1996 Act.[127] Under this precedent, a cable television system providing Internet service over a commingled facility is not a telecommunications carrier subject to the revised rate mandated by Section 224(e) by virtue of providing Internet

---

[127] *See* Federal-State Joint Board on Universal Service, *Report and Order*, CC Docket No. 96-45, 12 FCC Rcd 8776, at 9180-81, para.789 (rel. May 8, 1997), as corrected by Federal-State Joint Board on Universal Service, *Errata*, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997), *appeal pending in Texas Office of Public Utility Counsel v. FCC and USA*, No. 97-60421 (5th Cir. 1997); Federal-State Joint Board on Universal Service, *Order on Reconsideration*, CC Docket No. 96-45, 12 FCC Rcd 10095 (rel. July 10, 1997); Changes to the Board of Directors of the National Exchange Carrier Association Inc., Federal-State Joint Board on Universal Service, *Report and Order and Second Order on Reconsideration*, CC Docket Nos. 97-21, 96-45, FCC 97-253 (rel. July 18, 1997), as corrected by Federal-State Joint Board on Universal Service, *Errata*, CC Docket No. 96-45, DA 97-2477 (rel. Dec. 3, 1997); Changes to the Board of Directors of the National Exchange Carrier Association Inc., Federal-State Joint Board on Universal Service, *Order on Reconsideration, Second Report and Order and Further Notice of Proposed Rulemaking*, CC Docket Nos. 97-21, 96-45, FCC 97-292, 12 FCC Rcd 12437 (rel. Aug. 15, 1997); Federal-State Joint Board on Universal Service, *Third Report and Order*, CC Docket No. 96-45, (rel. Oct. 14, 1997), as corrected by Federal-State Joint Board on Universal Service, *Erratum*, CC Docket Nos. 96-45 and 97-160 (rel. Oct. 15, 1997); Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal- State Joint Board on Universal Service, *Second Order on Reconsideration in CC Docket 97-21*, CC Docket Nos. 97-21, 96-45, FCC 97-400 (rel. Nov. 26, 1997); Federal-State Joint Board on Universal Service, *Third Order on Reconsideration*, CC Docket No. 96-45, FCC 97-411 (rel. Dec. 16, 1997); Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge, *Fourth Order on Reconsideration*, CC Docket Nos. 96-45, 96-262, 94- 1, 91-213, 95-72, FCC 97-420 (rel. Dec. 30, 1997), as corrected by Federal-State Joint Board on Universal Service, *Errata*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, DA 98-158 (rel. Jan 29, 1998).

service. We note, however, that Congress has directed the Commission to undertake a review of the implementation of the provisions of the 1996 Act relating to universal service, and to submit a report to Congress no later than April 10, 1998.[128] That report is to provide a detailed description of, among other things, the extent that the Commission's definition of "telecommunications" and "telecommunications service," and its application of those definitions to mixed or hybrid services," are consistent with the language of the 1996 Act.[129] We do not intend, in this proceeding, to foreclose any aspect of the Commission's ongoing examination of those issues.

34. We need not decide at this time, however, the precise category into which Internet services fit. Such a decision is not necessary in order to determine the pole attachment rate applicable to cable television systems using pole attachments to provide traditional cable services and Internet services. Regardless of whether such commingled services constitute "solely cable services" under Section 224(d)(3), we believe that the subsection (d) rate should apply. If the provision of such services over a cable television system is a "cable service" under Section 224(d)(3), then the rate encompassed by that section would clearly apply.[130] Even if the provision

---

[128] Pub. L. 105-119, 111 Stat. 2440 (1997), sec. 623.

[129] *Id.*

[130] The legislative history of the 1996 Act may be read to support such a conclusion. See Conf. Rpt. at 206 which indicates that, "to the extent that a company seeks pole attachment for a wire used solely to provide cable television services (as defined by Section 602(6) of the Communications Act), that cable company will continue to pay the rate authorized under current law (as set forth in subparagraph (d)(1) of the 1978 Act)." Further, the Conference Report states that "[t]he conferees intend the amendment to reflect the evolution of cable to interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services," but

of Internet service over a cable television system is deemed to be neither "cable service" nor "telecommunications service" under the existing definitions, the Commission is still obligated under Section 224(b)(1) to ensure that the "rates, terms and conditions [for pole attachments] are just and reasonable," and, as Section 224(a)(4) states, a pole attachment includes "any attachments by a cable television system." And we would, in our discretion, apply the subsection (d) rate as a "just and reasonable rate" for the pro-competitive reasons discussed above. We again emphasize the pervasive purpose of the 1996 Act and the premise of the Commission's *Heritage* decision, to encourage expanded services, and that a higher or unregulated rate deters this purpose.[131] We note that in the one case where Congress affirmatively wanted a higher rate for a particular service offered by a cable system, it provided for one in section 224(e). In requiring that the Section 224(d) rate apply to any pole attachment used 'solely to provide cable service,' we do not believe Congress intended to bar the Commission from determining that the Section 224(d) rate methodology also would be just and reasonable in situations where the Commission is not statutorily required to apply the higher Section 224(e) rate.

35. We also disagree with utility pole owners that submit that all cable operators should be "presumed to be telecommunications carriers" and therefore charged at the higher rate unless the cable operator certifies to the Commission that it is not "offering"[132] telecommunications

---

was not intended to "cause dial-up access to information services over telephone lines to be classified as a cable service." *Conf. Rpt.* at 169.

[131] *See also Texas Utilities v. FCC*, 977 F.2d at 931-933.

[132] Telecommunications services means the offering of telecommunications for a fee directly to the public, or to such classes of users as

services.[133] We think that a certification process would add a burden that manifests no benefit. We believe the need for the pole owner to be notified is met by requiring the cable operator to provide notice to the pole owner when it begins providing telecommunication services. The rule we adopt in this *Order* will reflect this required notification. We also reject the suggestions of utility pole owners that the Commission should be responsible for monitoring and enforcing a certification of cable operators regarding their status.[134] The record does not demonstrate that cable operators will not meet their responsibilities. If a dispute arises, the Commission's complaint processes can be invoked.

* * * *

---

to be effectively available directly to the public, regardless of the facilities used. 47 U.S.C. § 153(43).

[133] *See* American Electric, et al., Comments at 46-47; Bell Atlantic Comments at 3; Colorado Springs Utilities Comments at 3; ICG Communications Comments at 27; MCI Comments at 6-9.

[134] *See* American Electric, et al., Comments at 46-47; Bell Atlantic Comments at 3; Colorado Springs Utilities Comments at 3; ICG Communications Comments at 27; MCI Comments at 6-9.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Oct. 12, 2000]

No. 98-6222

FCC Agency No. 97-151

GULF POWER COMPANY, ALABAMA POWER COMPANY, *et al.*,
Petitioners,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-2589

FCC Agency No. 97-151

TAMPA ELECTRIC COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-4675

FCC Agency No. 98-20-FCC

FLORIDA POWER & LIGHT COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6414

FCC Agency No. 98-20

COMMONWEALTH EDISON COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6430

FCC Agency No. 97-151-CS

POTOMAC ELECTRIC POWER COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6431

FCC Agency No. 97-151-CS

TEXAS UTILITIES ELECTRIC COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6442

FCC Agency No. 97-151-CS

UNION ELECTRIC COMPANY, d.b.a. AMERENUE,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6458

FCC Agency No. 97-151-CS

AMERICAN ELECTRIC POWER SERVICES CORPORATION,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6476

FCC Agency No. 97-151

DUKE ENERGY CORPORATION,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6477

FCC Agency 97-151

VIRGINIA ELECTRIC AND POWER COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6478

FCC Agency No. 97-151

CAROLINA POWER & LIGHT COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6485

FCC Agency No. 97-151

DUQUESNE LIGHT COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6486-CC

FCC Agency No. 97-151

DUQUESNE LIGHT COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

Petitions for Review of an Order
of the Federal Communications Commission

ORDER:

( ) The motion of Respondents, Federal Communications Commission and United States (FCC) for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is granted.

( ) The motion of Respondents, FCC for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of Respondents, FCC, for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of Respondents, FCC, for a further stay of the issuance of the mandate is DENIED.

/s/ [illegible]
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6486-CC

FCC Agency No. 97-151

DUQUESNE LIGHT COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

Petitions for Review of an Order
of the Federal Communications Commission

ORDER:

( ) The motion of Intervenor, National Cable Television Association, Inc. (NCTA) for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is granted.

( ) The motion of Intervenor, NCTA, for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of Intervenor, NCTA, for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of Intervenor, NCTA, for a further stay of the issuance of the mandate is DENIED.

/s/ [illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Sep. 12, 2000]

No. 98-6222

FCC Agency No. 97-151

GULF POWER COMPANY;
ALABAMA POWER COMPANY, *et al.*,
Petitioners,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-2589

FCC Agency No. 97-151

TAMPA ELECTRIC COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-4675

FCC Agency No. 98-20-FCC

FLORIDA POWER & LIGHT COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6414

FCC Agency No. 98-20

COMMONWEALTH EDISON COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6430

FCC Agency No. 97-151-CS

POTOMAC ELECTRIC POWER COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6431

FCC Agency No. 97-151-CS

TEXAS UTILITIES ELECTRIC COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6442

FCC Agency No. 97-151-CS

UNION ELECTRIC COMPANY, d.b.a. AMERENUE,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6458

FCC Agency No. 97-151-CS

AMERICAN ELECTRIC POWER SERVICES CORPORATION,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6476

FCC Agency No. 97-151

DUKE ENERGY CORPORATION,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6477

FCC Agency 97-151

VIRGINIA ELECTRIC AND POWER COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6478

FCC Agency No. 97-151

CAROLINA POWER & LIGHT COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6485

FCC Agency No. 97-151

DUQUESNE LIGHT COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6486

FCC Agency No. 97-151

DUQUESNE LIGHT COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

Petitions for Review of an Order
of the Federal Communications Commission

BEFORE: TJOFLAT and CARNES, Circuit Judges, and GARWOOD,* Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by Intervenor WORLDCOM, INC. is DENIED.

ENTERED FOR THE COURT:

/s/ [illegible]
UNITED STATES CIRCUIT JUDGE

* Honorable Will L. Garwood, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6486

FCC Agency No. 97-151

DUQUESNE LIGHT COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

Petitions for Review of an Order
of the Federal Communication Commission

BEFORE: TJOFLAT and CARNES, Circuit Judges, and GARWOOD*, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by Intervenor National Cable Television Association is DENIED.

ENTERED FOR THE COURT:

/s/ [illegible]
UNITED STATES CIRCUIT JUDGE

* Honorable Will L. Garwood, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

APPENDIX E

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

GULF POWER COMPANY,
ALABAMA POWER COMPANY, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

TAMPA ELECTRIC COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

FLORIDA POWER & LIGHT COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

COMMONWEALTH EDISON COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

POTOMAC ELECTRIC POWER COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

TEXAS UTILITIES ELECTRIC COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

UNION ELECTRIC COMPANY, d.b.a. AMERENUE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

AMERICAN ELECTRIC POWER SERVICES CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

DUKE ENERGY CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

VIRGINIA ELECTRIC AND POWER COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

CAROLINA POWER & LIGHT COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

DUQUESNE LIGHT COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

DUQUESNE LIGHT COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

Nos. 98-6222, 98-2589, 98-4675, 98-6414, 98-6430, 98-6431, 98-6442, 98-6458, 98-6476 to 98-6478, 98-6485 and 98-6486.

Sept. 12, 2000

Petitions for Review of an Order of the Federal Communications Commission (Nos. 97-151-CS, 98-20-FCC).

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion April 11, 2000, 11th Cir., 2000, 208 F.3d 1263)

Before TJOFLAT, EDMONDSON, BLACK, CARNES, BARKETT, MARCUS and WILSON, Circuit Judges.

PER CURIAM:

The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing En Banc is DENIED.

- All other active judges of the Court were recused.

CARNES, Circuit Judge, concerning the denial of rehearing en banc:

My opinion concurring in part and dissenting in part from the panel decision, *see Gulf Power Co. v. FCC*, 208 F.3d 1263, 1279 (11th Cir.2000), explains why I think the panel majority erred in holding the Pole Attachment Act's regulated rate provisions do not extend to attachments used for wireless communications and Internet services. There is no point in reiterating here what I said there. Instead, I write separately upon the denial of rehearing en banc, because this case is a good example of why the absolute majority provision of Federal Rule of Appellate Procedure 35(a) needs to be changed by Congress or by the Supreme Court through the Rules Enabling Act, *see* 28 U.S.C. § 2072.[1]

Rule 35(a) provides that: "A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc." This Court, along with some of the other federal courts of appeals, has interpreted "circuit judges who are in regular active service" to include all active circuit judges serving on the court at the time of the poll including those judges who are disqualified from participating. In other words, we interpret the rule to mean that the votes of absolute majority, or seven of the twelve judges in active service on our court now, are necessary to take a case en banc. I do not quarrel with our interpretation of the rule, although we are on the short side of a circuit split regarding it, *see* Judith A. McKenna et al., Federal Judicial Center, *Case Management Procedure in the Federal Courts of Appeals* 23 (2000) (table

[1] The operative language in Rule 35(a) is drawn from 28 U.S.C. § 46(c), which would need to be amended by Congress or superceded by an amendment to the rule, *see* 28 U.S.C. § 2072(b).

indicating that eight circuits do not count disqualified judges when calculating a majority for en banc rehearing purposes, while five circuits do).[2] But I do think that Rule 35(a) should be amended so that it is clear that disqualified judges are not counted, in effect, as a vote against rehearing en banc.

As the order denying rehearing en banc in this case indicates, five of the twelve judges in active service on this Court are disqualified from participating in this important case.[3] That leaves only seven judges. Two of those seven judges split on the legal issue in question—one of them authored the panel majority opinion and the other one dissented from an important holding in it. Yet the dissenting judge and the five remaining, non-disqualified judges in active service are unable to vote the case en banc under Rule 35(a), no matter how wrong they may think the panel majority's holding is, unless the judge who authored the panel majority opinion votes with them to do it. It sometimes happens that a judge who authors a panel opinion votes to

[2] A good recounting of the history of the interpretative issue and a summary of the arguments on both sides of it are contained in James J. Wheaton, Note, *Playing with Numbers: Determining the Majority of Judges Required to Grant En Banc Sittings in the United States Courts of Appeals*, 70 Va. L.Rev. 1505 (1984). *See also* Michael Ashley Stein, *Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review*, 54 U. Pitt. L.Rev. 805, 807-17, 825-27, 851-54 (1993).

[3] Some may say that all the order indicates is that five judges did not participate and that they obviously recused themselves, but not necessarily that they were disqualified from participating. *See generally* 28 U.S.C. § 46(b)("unless such judges cannot sit because recused or disqualified"). Whether there is any real distinction between recusal and disqualification is a collateral issue not material to the present discussion. What is material is that five judges of this Court in active service felt compelled not to participate in the en banc poll. I will follow what appears to be the practice of most commentators and decisions by using disqualification as a synonym for recusal.

take the case en banc, *see Songer v. Wainwright*, 756 F.2d 799 (11th Cir.1985)(Roney, J., specially concurring in the order granting rehearing en banc), but not very often.[4]

Assume with me, for present purposes, that this is not one of those rare cases in which the judge who authored the majority opinion for the panel wants to have it reviewed by the court sitting en banc—assume that judge has voted against en banc rehearing. If this is one of the usual cases where the author of the panel opinion votes against rehearing en banc, then this case could not be taken en banc no matter how strongly the remaining six non-disqualified judges thought it should be. En banc rehearing is not possible in such a situation because six is not seven, and Rule 35(a) insists on seven votes, and it is not satisfied by any fewer number, not even by six out of seven. The result is that the law of this circuit is decided not on the basis of the votes of a majority of the seven non-disqualified judges of this Court in active service, but instead by the vote of the senior judge from another circuit who was on the panel and broke the tie created by the conflicting votes of the two judges of this court in active service who were on the panel.[5] That is how Rule 35(a)'s absolute majority requirement operates.

As bad as the operation of Rule 35(a) is in this case, it can be worse. If one more judge in active service on this Court had been disqualified, it would have been impossible for the

---

[4] Sometimes a judge will author or join a panel decision dictated by a prior panel precedent that the judge feels should be changed by the en banc court. In that circumstance, which does not occur with much frequency, it is not unusual for a judge who wrote or joined the panel decision to vote to take the case en banc, in effect using it as a vehicle for overruling the prior panel precedent.

[5] In the usual case there will be a visiting judge or a senior judge of this Court sitting on a panel with two active judges. That was the way more than 70 percent of our panels were composed this court year.

remaining six non-disqualified judges to vote the case en banc, even if the judge who authored the majority opinion was willing to take the extraordinary step of voting for en banc rehearing.

The rule as written can even operate to impose on the circuit and its judges law with which every non-disqualified judge in active service disagrees. It is not unusual for our court to sit in panels consisting of one active judge plus two senior judges, or an active judge plus one senior judge and one visiting judge.[6] With such panels, if six or more judges in active service are disqualified from participating in a case, Rule 35(a) makes it possible for the law of the circuit to be set by one senior judge and one visiting judge, even though every one of the non-disqualified judges in active service (up to six in number) adamantly disagree with them about what that law should be.

It can be worse still. If the chief judge of the circuit declares an emergency, which is defined to include the illness of a judge, the requirement that a majority of each panel of a court of appeals be members (active or senior) of that court of appeals is lifted. *See* 28 U.S.C. § 46(b).[7] Although not frequently invoked, this emergency provision has recently resulted in a panel of our Court being composed of one judge in active service and two visiting judges. *See Parris v. The*

---

[6] By "visiting judge" I mean one who was not appointed to sit on this Court. A visiting judge can be a district judge from this or another circuit, or a senior circuit judge from another circuit.

[7] "In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness." 28 U.S.C. § 46(b).

Miami Herald Publ'g Co., 216 F.3d 1298, 1299 (11th Cir.2000) (panel consisting of one judge of this Court, a senior judge of another circuit, and a senior district court judge). In that circumstance, if six or more judges in active service on this Court were disqualified, Rule 35(a) could operate to have the law of the circuit made by two visiting judges, and there would be nothing that the six active judges of this Court who were not disqualified could do about it.

What possible justification can there be for the absolute majority rule—why make it possible to have the law of the circuit determined by one active judge against the views of six others, or by a senior and a visiting judge or two visiting judges against the views of six judges in active service? Why not let the decision whether to rehear a case en banc be made by a majority of the judges in active service who are not disqualified? More than a quarter of a century ago, Judge Mansfield, joined by two other Second Circuit judges, put forward two justifications for the absolute majority requirement of Rule 35(a), and 28 U.S.C. § 46(a) from which Rule 35(a) is drawn. *See Zahn v. Int'l Paper Co.*, 469 F.2d 1033, 1041 (2d Cir.1972)(Mansfield, J., concurring in the denial of rehearing en banc).

First, Judge Mansfield suggested, the absolute majority rule seeks "to achieve intracircuit uniformity by assuring that where questions of exceptional importance are presented the law of the circuit will be established by the vote of a majority of the full court rather than by a three-judge panel." *Id.* If protecting majority rule is the goal of Rule 35(a), then it is counterproductive. Under our prior panel precedent rule, a panel decision is the law of the circuit unless and until it is overruled by the Supreme Court or the en banc court. *See United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir.1998) ("The law of this circuit is emphatic that only the Supreme Court or this court sitting en banc can judicially overrule a prior panel decision.")(internal marks and citation omitted).

Every other circuit, or virtually every one, follows the same principle: The law of the circuit is established not just by en banc decisions, but by panel decisions as well. *See United States v. Washington*, 127 F.3d 510, 517 (6th Cir.1997)("In the Sixth Circuit, as well as all other federal circuits, one panel cannot overrule a prior panel's published decision."); Phillip M. Kannan, *The Precedential Force of Panel Law*, 76 Marq. L.Rev. 755, 755-56 (1993) ("[A]ll thirteen circuits, with the possible exception of the Seventh Circuit, have developed the interpanel doctrine: No panel can overrule the precedent established by any panel in the same circuit; all panels are bound by prior panel decisions in the same circuit."). The absolute majority requirement does nothing to prevent panel decisions from establishing the law of the circuit; instead, the requirement makes it more difficult, or impossible, to have the law made in some panel decisions reviewed en banc.

By insulating panel decisions from en banc review, the absolute majority rule makes it less likely that the law of the circuit will represent the views of a majority of the judges in active service. After all, which is a better bet to reflect the views of seven of twelve active judges—the views of six of those judges, or the views of one? And where a question of exceptional importance is involved, shouldn't the law of the circuit be decided by six out of twelve active judges instead of by one active judge coupled with a visiting judge? With en banc worthy issues is it not better to have the law of the circuit decided by six of twelve judges in active service than by one of them, or by none of them—which is what can happen under Rule 35(a) when a panel includes two senior judges or a senior and a visiting judge.

Judge Mansfield also suggested that the absolute majority requirement "serves the further salutary purpose of limiting en banc hearings to questions of exceptional importance rather than allow the court to drift into the unfortunate habit

of requiring such hearings in every case where a minority of the court may desire a decision by the full court." *Zahn*, 469 F.2d at 1041. Two things about that. First, the question is not whether to limit en banc review to questions of exceptional importance, but who is better to decide whether a case meets that standard and warrants en banc review—a majority of the judges in active service who are not disqualified, or a minority of those non-disqualified judges, perhaps only one of them? Second, whatever may have been the case a quarter of a century ago, viewed from the perspective of federal appellate courts struggling under the heavy and increasing caseloads of the present day, the notion that courts might "drift" into the "unfortunate habit" of having too many en banc rehearings is quaint. En banc rehearings take a lot of judicial resources and no court of appeals is going to drift into the habit of having too many of them regardless of whether Rule 35(a) is amended.

Judge Adams of the Third Circuit also had a go at justifying the absolute majority requirement. The case was *Lewis v. Univ. of Pittsburgh*, 725 F.2d 910 (3d Cir.1983), and the vote was five for rehearing en banc, three against, and two disqualified, *id.* at 928-29 (opinion of Adams, J., on the petition for rehearing). Fearing that the result—denial of rehearing en banc when the vote was five to three in favor of it—"must appear quite unfair" to the losing litigant, Judge Adams attempted to explain the reason for the absolute majority requirement. *Id.* at 929. The "main reason" for the requirement, he said, "is that it insures that major developments in the law of the Circuit reflect the participation of all members of the Court." *Id.* But, of course, because of the prior panel precedent rule the absolute majority requirement does not do that at all. The decision of the panel majority, even if it was composed of only one active judge (or none), is the law of the circuit unless and until overruled en banc or by the Supreme Court. Coupled with

the prior panel precedent rule, the absolute majority requirement actually operates to make it more likely that the law of the circuit will not represent the views of a majority of the judges in active service. It does that by preventing the non-disqualified active judges from voting a case en banc in some circumstances even where they (because of their greater number) are more likely to reflect the views of the majority of judges in active service than those, if any, voting against en banc rehearing.

Judge Adams also suggested that lowering the absolute majority bar would lead to the law becoming more unsettled. *See id.* He gave as a hypothetical for his court, which had ten active members, the situation in which there were five recusals and a vote of three to two in favor of en banc rehearing. *See id.* Two things about that. First, Judge Adams did not explain why letting the law be decided by three active judges instead of by two would unsettle it. Perhaps the assumption is that en banc rehearings are unsettling, and therefore the fewer of them the better. But leaving a panel opinion in place, particularly if en banc review is sought because the panel opinion conflicts with one or more prior panel decisions, or with a Supreme Court decision, can also unsettle the law. Second, the argument that the absolute majority requirement promotes stability in the law by reducing the number of en banc rehearings knows no end. If cutting down on the number of en banc rehearings is the goal, why limit the effort to recusal situations? Why not raise the bar in all cases by requiring the vote of some super majority, such as three-fifths or three-fourths, of all active judges?

Rule 35(a) should be clarified through amendment, because the circuits are split eight to five on the issue, *see* McKenna, *supra*, and there is no good reason why a uniform rule should not be followed in all the circuits. For example, both the Tenth Circuit and this circuit have twelve authorized

judgeships. If five active judges are disqualified and six of the remaining seven are convinced the panel decision should be corrected en banc, in the Tenth Circuit it will be. In this circuit, it will not be. A litigant who loses before a panel in this circuit should not be treated differently in terms of the basic en banc procedures than one who loses before a panel in the same circumstances in another circuit. The definition of "majority of the circuit judges who are in regular active service" should not vary with geography.

It is particularly unfortunate that the geographic lottery relating to Rule 35(a) has worked against en banc rehearing in this case, because this is an important case that may affect every person who uses wireless communication or Internet service in this country. The case comes to us on consolidated petitions for review filed by power companies from around the country and involves the competing interests of those companies, telephone companies, cable television companies, wireless communication companies, Internet service providers, and of course, consumers. A more national case could hardly be imagined. And, as the Department of Justice points out, "because this case arose on Hobbs Act review of FCC rules, it may present the last opportunity for *any* court to address the core, industry-shaping issues presented here." FCC's Petition for Panel Rehearing and Suggestion for Rehearing En Banc at 2. Yet the law on those industry-shaping issues of exceptional importance is decided not by a majority of the judges in active service on this Court but instead solely by one active judge of this Court joined by a senior judge from another court.

In his defense of the absolute majority requirement, Judge Mansfield said that it is not unfair, because "[i]n cases of exceptional importance, or where there is a conflict between circuits, it may be expected that the Supreme Court will grant certiorari and settle the questions in issue." *Zahn*, 469 F.2d at 1041. We will see.

APPENDIX F

47 U.S.C. § 224. Pole attachments

(a) Definitions

As used in this section:

(1) The term "utility" means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

(2) The term "Federal Government" means the Government of the United States or any agency or instrumentality thereof.

(3) The term "State" means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

(4) The term "pole attachment" means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

(5) For purposes of this section, the term "telecommunications carrier" (as defined in section 153 of this title) does not include any incumbent local exchange carrier as defined in section 251(h) of this title.

(b) Authority of Commission to regulate rates, terms, and conditions; enforcement powers; promulgation of regulations

(1) Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders, as authorized by section 312(b) of this title.

(2) The Commission shall prescribe by rule regulations to carry out the provisions of this section.

(c) State regulatory authority over rates, terms, and conditions; preemption; certification; circumstances constituting State regulation

(1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f) of this section, for pole attachments in any case where such matters are regulated by a State.

(2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that—

(A) it regulates such rates, terms, and conditions; and

(B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments as well as the interests of the consumers of the utility services.

(3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments—

(A) unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attach ments; and

(B) with respect to any individual matter, unless the State takes final action on a complaint regarding such matter—

(i) within 180 days after the complaint is filed with the State, or

(ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

(d) Determination of just and reasonable rates; "usable space" defined

(1) For purposes of subsection (b) of this section, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

(2) As used in this subsection, the term "usable space" means the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment.

(3) This subsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service. Until the effective date of the regulations required under subsection (e) of this section, this subsection shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) to provide any telecommunications service.

(e) Regulations governing charges; apportionment of costs of providing space

(1) The Commission shall, no later than 2 years after February 8, 1996, prescribe regulations in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges. Such regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments.

(2) A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

(3) A utility shall apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity.

(4) The regulations required under paragraph (1) shall become effective 5 years after February 8, 1996. Any increase in the rates for pole attachments that result from the adoption of the regulations required by this

subsection shall be phased in equal annual increments over a period of 5 years beginning on the effective date of such regulations.

(f) Nondiscriminatory access

(1) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.

(2) Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.

(g) Imputation to costs of pole attachment rate

A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section.

(h) Modification or alteration of pole, duct, conduit, or right-of-way

Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible.

(i) Costs of rearranging or replacing attachment

An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way).

(June 19, 1934, c. 652, Title II, § 224, as added Feb. 21, 1978, Pub.L. 95-234, § 6, 92 Stat. 35 and amended Sept. 13, 1982, Pub. L. 97-259, Title I, § 106, 96 Stat. 1091; Oct. 30, 1984, Pub.L. 98-549, § 4, 98 Stat. 2801; Oct. 25, 1994, Pub.L. 103-414, Title III, § 304(a)(7), 108 Stat. 4297; Feb. 8, 1996, Pub.L. 104-104, Title VII, § 703, 110 Stat. 149.)

47 U.S.C. § 157. New technologies and services

* * * *

HISTORICAL AND STATUTORY NOTES

* * * *

Advanced Telecommunications Incentives

Pub.L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, provided that:

"(a) In general.—The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local

telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

"(b) Inquiry.—The Commission shall, within 30 months after the date of enactment of this Act [Feb. 8, 1996], and regularly thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

"(c) Definitions.—For purposes of this subsection:

"(1) Advanced telecommunications capability.—The term 'advanced telecommunications capability' is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

"(2) Elementary and secondary schools.—The term 'elementary and secondary schools' means elementary and secondary schools, as defined in paragraphs (14) and (25), respectively, of section 14101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 8801) [section 8801(14) and (25) of Title 20, Education]."

APPENDIX G

The following is a list of parties to the Eleventh Circuit proceedings that are not listed in the caption of the decision below (see Appendix A): -

Arizona Cable and Telecommunications Association

AT&T Corp.

BellSouth Corporation

Georgia Power Company

GTE Service Corporation

Houston Lighting and Power Company

MCI Telecommunications Corporation

National Cable Television Association, Inc.

Nevada Bell

Pacific Bell

Pennsylvania Cable and Telecommunications Association

Public Service Electric and Gas Company

SBC Communications Inc.

Southern Company Services, Inc.

Southwestern Bell Telephone Company

U S WEST, Inc.